Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

David Fichtenberg, Petitioner, pro se

vs.

Federal Communications Commission and the United States of America, Respondents

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On Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1997 the Federal Communications Commission ("FCC") concluded a rule making in the matter of Guidelines for Evaluating the Environmental Effects of Radiofrequency ("RF") Radiation and adopted certain statutes preempting local regulation of RF exposure. FCC addressed RF exposure from cellular phone, cellular towers and other RF sources. On health related matters FCC said it would generally defer to its advising federal health agencies. Some comments in the record, particularly, public comment on health related topics, including those submitted under 47 U.S.C. 405 (Petition for Reconsideration) were not given meaningful consideration by any party because FCC said it could rely on its advising expert federal agencies.

1. EXCLUSION OF CONSDERATION OF PUBLIC COMMENT:

Whether, under the Administrative Procedures Act (APA), National Environmental Policy Act (NEPA), and statute 47 U.S.C. 405 (Petition for Reconsideration to FCC), lead agencies in a rule making on a matter in which they are not expert and where they defer to advising expert agencies and technical committees, may avoid assuring meaningful consideration of comments in the record. particularly public comment, when such comment would lawfully be required were the advising expert agencies issuing a similar rule making?

2. REVERSING POLICY OF MINIMIZING RF EX-

POURE TO CELLULAR PHONES AND TOWERS:

Whether FCC exercised its lawful discretion under APA, NEPA, and 47 U.S.C. 405, when in its new RF guidelines, FCC did not follow Congressional policy in 47 U.S.C. 324 requiring that exposure to RF power be minimized, when FCC did not explain why it reversed and rejected its previous policy of requiring its licensees to keep RF radiation exposure from their facilities and devices as low as reasonably achievable, and when FCC extended such requirement during a transition period?

3. FCC DOING THE 'FUNCTIONAL EQUIVALENT' OF NEPA REQUIREMENTS

Whether lead agencies who are not expert in the on health or environmental impact of the matter of their rulemaking, may define some 'functionally equivalent' procedures to NEPA to follow and so avoid their formal NEPA requirements?

4. PROPER DELEGATION OF AUTHORITY TO FCC?

Whether Congress may delegate authority to preempt State and Local public health and safety regulations to an agency, such as the preemption authority granted to the FCC in 47 U.S.C. 332(c)(7)(B)(iv) or in 47 U.S.C. 253(b), when that agency does not have expertise in that public health or safety matter?

5. ARE HEALTH EFFECTS PART OF ENVIRONMENTAL EFFECTS?

Whether the FCC may apply typical agency discretion to resolve ambiguous statutory terms and imply from 47 U..S.C. 332(c)(7)(B)(iv) its preemption of local public health and safety regulations pertaining to the siting, use, and operation of cellular towers and other wireless facilities on the basis of "health effects" of RF radiation from such facilities, when the Telecommunications Act of 1996 (TCA) prohibits implied preemption, only preempts the undefined term "environmental effects", provides in TCA Sec. 253(b) for State regulations protecting the public safety and welfare even if it may create barriers to entry of FCC licensed services, and when FCC does not have expertise in RF health matters?

6. PREMPTION OF LOCAL REGULATIONS PROTECTING THE ENVIRONMENT AND HEALTH

Whether Congress, by preempting local land use cellular phone tower RF exposure regulations to protect the environment (or the public health - if FCC interpretation is adopted), has de facto forced jurisdictions to comply by leaving them no real choice, or to be compelled if they refuse, has commandeered legislative processes of the states to administer a federal program, in violation of the Tenth Amendment as described in New York v. United States, 505 U.S. 144 (1992)and Printz v. United States, 521 U.S. 898 (1997)

LIST OF PARTIES

Petitioners

All parties in the proceeding below do not appear in the caption on the cover page of this petition.. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Cellular Phone Taskforce, Ad-Hoc Association of Parties Concerned About the Federal Communications Commission Radio Frequency Health and Safety Rules; David Fichtenberg; Citizens for Appropriate Placement of Telecommunications Facilities; John Bardis; Erica Zweig, Christopher Beaver, of Noe Valley Families Against the Antennas; Major Belkin; Donna Casey; Maggie Fox; Eileen Lahey; Mark R. Shirely; M. Sue Storm, of Healthy Home Alliance; Joseph Bohacz; Candice Brown; Gary Brown, of Families for Appropriate Cellular Tower Siting; Susan Clarke, of Environmental Health Advocacy League; Mary-Croughan Minihane; Libby Kelley; Silvia M. Siegel; Annegret C. Topel, of Citizens of Marin for Sensible Communications Planning; Jerry Davis; Jean Foley, of Ulysses Citizens for Responsible Technology; Holly A. Fournier, Selectboard member of Charlotte, VT and co-chair of Citizens for Appropriate Placement of Telecommunications Facilities; Julianna Free, of Lifetime Resources, Inc.; Anne Galloway, of Hardwick Action Committee; David Gell; Richard Gianattiasio, of Northboro Residents for Responsible Tower Siting; Dale A. Newton; Janet R. Newton; Bernard Greenberg; Laridna A. Knowlton; Roger Knowlton, of Thistle Hill Neighborhood Alliance; Cathy Bergman-Venezia; Frank Goodrich; Andrew J. Hillman; Marija Huges; Mark Hutchins; Ralph E. Munston, of EMR Alliance; Julie E. Jordan, of Coalition of Concerned Citizens For Responsible Technologies; Jeannine Karlsson, Commissioner of Town of Bedford Conservation Board; Patricia Kelley; S.G. Lawrence; Emery Lazar; Dawn Mason; Dorothy Miller, Advisory Neighborhood Commis-

sioner; Edward Steinman; Peter De Pippo; Michael Worsham; The Communications Workers of America, AFL-CIO; CWA Local 7810; Rainer Waldman Atkins; Alan Golden; Virginia J. Moore-Ward; Faye Mueller-Hebert; Patricia Vaughey; Bill Jenkins; and Council of Washington State CWA Locals.

Other Respondents are the Federal Communications Commission and The United States of America.

And Respndent Intervenors are the Cellular Telecommunications Industry Association, National Association of Broadcasters, Association for Maximum Service Television, Inc. Electromagnetic Energy Association, and AT&T Wireless Services, Inc.

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APPENDIX A

See Appendix A submitted with a Petition for Writ of Certiorari in behalf of Citizens For The Appropriate Placement Of Telecommunications Facilities et al., by counsel Whitney North Seymour and Peter J. Clines of the law firm Landy & Seymour, and submitted to the proceeding in the court whose judgment is the subject of this and their petition

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Table of Authorities Cited

Cases

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vs. State Farm Mutual

New York v. United States,
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Printz v. United States,
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Cellular Telephone Co. v.
Town of Oyster Bay,
166 F.3d 490 (2nd Cir. 1999)

Iowa Wireless Services, L.P.
v. City of Moline, Ill
29 F.Supp. 915 (C.D.Ill 1998)

Omnipoint Corp. v.
Zoning Hearing Bd.
of Pine Grove, TP

20 F.Supp. 2d 875,
881-92 (E.D. Pa. 1998)

Illinois RSA No. 3 v.
County of Peoria, 965 F. Supp.
732, 747, (C.D. Ill. 1997)

BellSouth Mobility Inc. v
Gwinnett County Georgia,
944 F. Supp. 923, 929 (N.D. 1996).

Statutes and Rules

28 U.S.C Sec. 1254(1)
47 U.S.C. 405

47 U.S.C 324

47 U.S.C. 332(c)(7)(B)(iv)

Telecommunications Act of 1996
Sec. 253(b)
Sec. 601
Sec. 704

Rule and Order in ET-Docket 93-62,
reported in
Notice FCC 96-326
found at 11 F.C.C Rcd 15123 (1996)

Second Memorandum Opinion and
Order in ET-Docket 93-62
Found at
12 F.C.C. Rcd 13494(1997)

Other:

ANSI C95.1-1982 RF standards

ANSI C95.1-1992 RF standards

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS AND JUDGMENTS BELOW

On August 1, 1996 the Federal Communications Commission ("FCC") released its final order Report And Order ("R&O") regarding FCC ET Docket 93-62 in the matter of Guidelines for Evaluating the Environmental Effects of Radiofrequency Emissions ("RF Guidelines"). This was reported in FCC Notice 96-326 and at 11 F.C.C. Rcd. 15123 (1996). On August 25, 1997, FCC released notice FCC 97-303 which contained its second final order on this matter and is reported at 12 F.C.C. Rcd 13494 (1997).

The original opinion of the United States Court of Appeals for the Second Circuit which reviewed the above orders is reported as Cellular Phone Taskforce v. FCC, 205 F.3d 82 (2nd Cir. 2000). It is reproduced at Appendix A-1, in the Appendix A submitted with a Petition for Writ of Certiorari by counsels Whitney North Seymour, Jr. and Peter J. Clines of the law firm Landy & Seymour in behalf of Citizens For The Appropriate Placement of Telecommunications Facilities and other parties to the above Court of Appeals proceeding whose judgment is the subject of this and their petition ("App. A"). The Opinion by the Second Circuit denying the petition for rehearing by the Cellular Phone Taskforce ("CPT") is reproduced at App. A-23.

The Opinion by the Second Circuit denying the petition for rehearing by the Communications Workers of America is electronically reported at 2000 WL 862305 and reported herein at A-26.

Because of their voluminous nature, copies of the above FCC Orders have been lodged with the Clerk of this Court in conjunction with the above mentioned Petition for Writ of Certiorari submitted by the law firm Landy & Seymour. Also because of their voluminous nature, standards referenced in 47 CFR 1.1307(b)(4)(i) and (ii) that the First Final order established to apply during a transition period are also lodged with the Court as well FCC OST Bulletin No. 65 and OET Bulletin No. 65 that describe how compliance with the standards in 47 CFR 1.1307(b)(4)(i) and (ii), respectively, may be met.

JURISDICTION

On February 18, 2000, the Court of Appeals affirmed the above two challenged final orders of the FCC, in which it upheld the validity of the statutory and regulatory provisions in question. The Court of Appeals denied the timely filed petition of Cellular Phone Taskforce on June 6, 2000 (A-23), and denied the timely petition for rehearing by the Communications Workers of America on June 15, 2000 (A-26). Pursuant to Supreme Court Rule 13, this petition is timely filed within 90 days of that latter petition. This Court has jurisdiction under 28 U.S.C. Sec. 1254(1).

Standing of Petitioner:

Mr. Fichtenberg has a Master of Biostatistics and Master of Public Health degree from the University of

California at Berkeley. He has participated in the FCC rule-making proceeding below with his earliest letter dated December 10, 1995 raising concerns about adverse health effects from RF radiation and proposing FCC RF regulation changes. It is in the FCC record of this proceeding. [See Second Ciruit Joint Appendix ("JA") at 578]. In September 1996, he submitted on behalf of Ad-Hoc Association an accepted Petition for Reconsideration to the FCC pertaining to its First Order [JA 890] and subscribed to it in behalf of the (State of) Washington Council For Safe Wireless Technology [JA 901].

In the above Petition, Mr. Fichtenberg noted his children attended a school, Northwest Yeshiva High School on Mercer Island, Washington on whose property a cellular tower was to be erected [JA 909]. Subsequently, the cellular tower was erected within 20 feet of the school's property and is there now. As a donor, past member of its Education Committee, and member of the school's community organization, Mr. Fichtenberg seeks to educate the school's leaders of the possible health risks and structural modifications to attenuate the signal that he believes should be considered. He is harmed in these efforts because the leaders rely on the FCC's findings that "There is no evidence to suggest that transmitters or facilities that comply with our guidelines will cause adverse health effects." [Notice FCC 97-303, par. 111]. Had the FCC had the studies and the analyses Mr. Fichtenberg submitted to the FCC been evaluated by those with expertise in RF health matters, it is very likely the FCC would have been informed the opposite of its conclusion is true. A favorable decision by this Court that such comment should be considered will make Mr. Fichtenberg's efforts to protect his school easier.

Mr. Fichtenberg does not visit his friend, Boris

Makovoz (who lives in a second floor apartment at 5111 South Dawson, Seattle, Washington, 98118) as often as Mr. Fichtenberg would like, nor does he stay for such visits as long as he would like. This is because there is a wireless telecommunications facility on the roof-top of a one story retail business adjoining Mr. Mokovoz's apartment. This facility approximately the same height of Mr. Makovoz's appartment and within 25 feet of it. As a result, microwave radiation close to the main beam of the transmitter may irradiate through a large glass window into Mr. Makovoz's apartment. I believe that a favorable decision by this court will increase the chance that the apartment owner will be made aware of the need to keep exposure as low as reasonably achievable and so take measures to attenuate the signal. Mr. Fichtenberg would then visit his friend more often and stay longer.

Mr. Fichtenberg rides to work in a vanpool and also rides public transit regularly each month where he is exposed within 3 feet of users of cellular phones. Had the FCC adopted the ALARA policy, it would be easier for him to convince others not to use a cellular phone so close to his person. Also, he lives within 400 feet of wireless telecommunications transmitters on a roof-top in a valley along which is a commercial street.. His hillside home is about the same vertical level as the transmitters and so he is exposed to its horizontal main beam. Had the ALARA policy been adopted by FCC, it is possible that alternative sites near the tops of hills, instead of in a valley could have been selected for the transmitter, thereby reducing his RF exposure. If the FCC will adopt ALARA, then it will be easier for Mr. Fichtenberg to seek a re-location of the transmitters.

Mr. Fichtenberg has been spokesperson for Ad-Hoc Association of Parties Concerned About the Federal Com-

munications Commission Radiofrequency Health and Safety Rules ("Ad-Hoc Association") since it formed shortly before he filed with the FCC a Petition for Reconsideration in behalf of Ad-Hoc Association and which was subscribed to by other parties. Note that some other parties subscribing to this September 1996 Petition for Reconsideration to the FCC, such as Cathy-Bergman-Venzia, at Second Circuit Joint Appendix ("JA") 905, JA 0914, and Marija Hughes at JA 906, as well as at JA 0915 and 6038-6060 (where she describes how she has been affected by RF radiation) are now petitioners in the Petition for Writ of Certiorari noted above submitted by counsels Whitney North Seymour, Jr. and Peter J. Clines.

As President of Ad-Hoc Association Mr. Fichtenberg was on its founding Board when it registered with the State of Washington as a non-profit organization (Uniform Business ID # 601-796-186) on June 6, 1997 (App. C). It continues to be a duly authorized Washington non-profit corporation (App. C). Section #4 of the Articles of Incorporation of Ad-Hoc Association describe its mission which Mr. Fichtenberg seeks to carry out, as part of his duties as President. His duties include carrying out the Ad-Hoc Association mission of:

> "educating and informing workers and the public about the biological, health, safety, and environmental effects and legal issues associated with NIER (non-ionizing electromagnetic fields."

To achieve this mission, Mr. Fichtenberg spoke, for example, at a forum in a hearing room of the U.S. Senate in March 1999, and as recently as August 2000 spoke on an Indiana radio show on why the FCC conclusions are inadequate. As spokesperson for Seattlites for Appropriate Antennas in our Neighborhoods (SAANE), he led a legal challenge of the adequacy of proposed City of Seattle tele-

communications amendments, and is now in discussions with the City of Seattle on this matter.

In November 1996, Mr. Fichtenberg, the Ad-Hoc Association and several other parties submitted Petitions for Judicial Review to the United States Court of Appeals. (see List of Parties naming Mr. Fichtenberg in proceeding below). In the Principal and Reply Brief of Ad-Hoc Association in which Mr. Fichtenberg joined in submitting to the Second Circuit (see App. C-3), Mr. Fichtenberg challenged as arbitrary certain FCC discretionary decisions as well as challenging that FCC exceeded its statutory authority or that the statute it relied upon to preempt local public health RF regulations were unconstitutional.

All of the Questions Presented above by Mr. Fichtenberg pertain to issues that were raised in the challenged FCC proceeding below and before the proceeding before the Untied States Court of Appeals For The Second Circui. The FCC decisions associated with these questions adversely affect Mr. Fichtenberg and a favorable decision by this Court would give Mr. Fichtenberg relief. So these Questions Presented have standing to be considered in this Petition for Writ of Certiorari. Specifically:

- The issue of whether the Commission should have sought a response from its advising federal health agencies to the requests to modify the FCC rules based on RF health considerations was discussed in the record in the Ad-Hoc Association et al. Petition for Reconsideration to the FCC ("AHA Recon.") (JA 0878-0879, Item 5, "Considering views of health agencies"). FCC notes this Ad-Hoc Association request (Notice FCC 97-303, par. 25) and describes why it did not ask its advising federal health agencies for advice on how to respond to the requested modifications of Ad-Hoc Association at

FCC Notice 97-303, Par.#29-39. It was raised in the Ad-Hoc Association et al. brief Mr. Fichtenberg joined (DF Brief) at ?? and discussed in the Opinion at A-??

- The question of whether the FCC should adopt the requirement that exposure be "as low as reasonably achievable" (ALARA), was raised in the FCC proceeding in the AHA Recon. at 18, and by Mr. Fichtenberg comments to FCC of Oct. 8, 1996 (JA 1018). FCC notes this at FCC 97-303, par #25. It is discussed in the Opinion at A-.??

- Whether FCC met its NEPA requirements is raised throughout the petitions for reconsideration of Ad-Hoc Association and Cellular Phone Taskforce.

- Whether 'health effects' are within 'environmental effects' regarding FCC preemption authority over the siting and operation of FCC licensed facilities is raised at AHA Recon at JA 887-888, Item #15 and by Mr. Fichtenberg in his Oct. 8, 1996 comments to FCC at JA 1008-1012. It is discussed in the DF Brief at and Reply at. The Opinion states Congress' intent to include health regulations within the FCC preemption at Opinion A

- Whether FCC was given improper delegated authority to preempt local wireless siting and operation regulations to protect the environment or the public health is discussed also JA 887-888 and at 1008-1012. The issue of whether FCC had proper delegated authority was explicitly raised in the Cellular Phone Taskforce Brief

The Second Circuit affirmed FCC's preemption

authority was properly delegated at Opinion A

- Whether the above preemption violates the 10th amendment, even when delegated to an agency with expertise in the matter was raised, for example, by Second Circuit petitioner Jerry Davis in his February 15, 1995 letter to the FCC. He said such preemption "overide(s) the 10th amendment" and that, "There is not sufficient justification for the FCC to control rulemaking and threaten the health, safety, and welfare of citizens by prohibiting reasonable regulations brought on by state and local officials." [JA 6138]. Note: Mr. Davis is now represented in the Petition for Writ of Certiorari submitted by counsels Seymour and Clines discussed above. The Opinion discusses this issue at A-??.

For the above reasons, if the Court will find in favor of the challenges raised in this petition, then I will get helpful relief.

Moreover, the harms above meet standing criteria as given in Friends of the Earth, Inc. v. Laidlaw Services (TOC) Inc. 120 S.Ct. 693, 145 L.Ed2 610

CONSTITUTIONAL AND STATUORY PROVISIONS INVOLVED

As most of the citations are lengthy, the relevant point of the statute is noted here and in the Appendix A submitted by counsels Seymour and Clines noted above, or the text is in Appendix B.

- Constitutional provisions:

  Article 1 Section 1, Article 1 Section 8, paragraph 18, Amendment One, Five, and Ten [at Appendix A-28]

  Amendment Two: A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

  Statutory and Regulatory Provisions:

- 5 U.S.C. Sec. 500
- 15 U.S.C. Sec. 2602(6): Disjunctively mentions and so distinguishes between "health" and "environment"
- 28 U.S.C sec. 1254(1)
- 29 U.S.C. 701

- 47 U.S.C. 405 see App. B
- 47 U.S.C 324 see App. B
- 40 CFR Chapter V (7-1-96 Edition) Sec. 1506.6 Public Involvement

  (a) [Agencies shall] Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

- 42 U.S.C. Sec. 2021(h): Establishes the Environmental Protection Agency as responsible for being expert on radiation matters

- 42 U.S.C. 4332 in relevant part, see A-32

- 42 U.S.C. Sec. 7412(a) subsections (6) and (7) distinguish between "hazardous pollutants" [subsection (6)] that are adverse to human health vs. "adverse environmental effects".[subsection (7)]

- 42 U.S.C. Sec. 7412(b)(2) – Describes how a list of pollutants hazardous to health is to be maintained based upon evidence they pose "a threat of adverse human health effects." And states a substance should not be on the list "solely due to its adverse effects on the environment."

- Telecommunications Act of 1996 PL 104-104, 110 Stat 56, Sec 253 [see Appendix B-??]

  and Sec. 704 [establishes 47 USC 332(c)(7),

  including FCC preemption authority in 47 U.S.C. 332(c)(7)(B)(iv)

[See Appendix A submitted by counsels Seymour and Clines, p. A-29 to A-31]

Describes local siting and land use control over cellular phone tower and related facilities, including preemption of local RF exposure regulations, and stipulates that FCC complete its NEPA rule-making on impact on the environment from RF emissions from FCC facilities.

American National Standards Institute (ANSI) C95.1-1982 and C95.1-1992 lodged with the Court

Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 8 F.C.C. Rcd. 2849, 1993 WL 757412 (1993) [Notice of Proposed Rule Making in FCC ET-Docket 93-62]

Report and Order in ET-Docket 93-62, 11 F.C.C. Rcd. 15123 (1996), and reported as notice FCC 96-326

Second Memorandum Opinion and Order in ET-Docket 93-62, and reported as notice FCC 97-303, and

Notice of Proposed Rule Making in the Matter of Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 47 U.S.C. 332(c)(7)(B)(v) of the Communications Act of 1934 as amended, FCC WT Docket 97-197 (later referred to as WT Docket 97-192

In 12 F.C.C. Rcd. 13494 (1997)

47 CFR 1.1307(b)(4)

STATEMENT OF THE CASE

BACKGROUND:

Among the early efforts of Congress to minimize adverse impacts from the strength of radio frequency (RF) radiation, a known impact then being RF interference, was its establishing the policy that

> "In all circumstances, except in case of radio communications in distress, all radio stations, including those of the United States, shall use the minimum power necessary to carry out the communications desired." [47 U.S.C. 324, established 1934] [App. B-??]

In response to an earlier statute, Regulation 24 of Sec. 54 of Title 47, which used the word "energy" instead of "power", a U.S. Attorney General opinion stated that

"[T]he Secretary of Commerce was not given the authority to determine in advance what this minimum amount should be for every case * * *" [35 Op. Atty. Gen, 126 (1926).

In 1985, for FCC to meet its National Environmental Policy Act ("NEPA"), requirements, it considered the impacts of RF radiation from the facilities of its licensees and adopted the 1982 standard for human exposure to RF radiation of the American National Standards Institute ("ANSI"), designated as ANSI C95.1-1982 ("ANSI 1982") [Second Circuit Opinion ("Opinion") at A-1. This FCC standard (now lodged with the Court) set required that,

> "Where exposure conditions are not precisely known or controlled, exposure reduction should be accomplished by reliable means to values as low as reasonably achievable."(called "ALARA") [ANSI 1982, p.11, and in AHA Brief at]

In its instructions of how to comply with ANSI 1982, called OST Bulletin No. 65, FCC noted (at page ?? of this bulletin) the ALARA requirement of ANSI 1982.

In 1986 the National Council on Radiation Protection and Measurements adopted an RF guideline, and in 1993, after ANSI revised its RF standard in 1992, FCC opened a Notice of Proposed Rule Making in ET Docket 93-62 to update its RF NEPA guidelines [Opinion A3-4]

The FCC recognized there was conflict amongst scientific organizations on what the proper RF standard should be, and made a policy decision to generally defer to the advice of the federal health agencies [Opinion A-9]. FCC issued its RF guidelines in its first final rule, Rule & Order, in August 1996 [Opinion A-4].

During the intervening 6 years FCC said that no consideration was given to public comments on how RF health studies should impact FCC RF guidelines. FCC stated this was because,

"[The] guidelines are based on recommendations of expert organizations and federal agencies with responsibilities for health and safety. It would be impractical for us to independently evaluate the significance of studies purporting to show biological effects, determine if such effects constitute a health hazard, and th[en] adopt stricter standards than those advocated by our federal health and safety agencies." [Opinion A-9].

The Opinion noted that,

> "[EPA] had been on the verge of releasing its own draft guidelines pertaining to the health effects of RF radiation in 1996. It was fully reasonable for the FCC to expect the agency with primacy in evaluating environmental impacts to monitor all

relevant scientific input into the FCC's consideration, particularly since EPA had been assigned the lead role in RF radiation health effects since 1970." [Opinion A-10].

Consistent with the FCC report and the Opinion above, EPA confirmed in a May 1999 that EPA was not asked to evaluate any of the material submitted into the above FCC docket [App. B-??] This EPA letter was sent May ??, 1999 by the Cellular Phone Taskforce counsel to the Second Circuit per Fed. Rule of App. Proc. 28(j))

In its First Order (Report & Order) FCC recognized a consensus of recommendations from its advising RF experts of the need to apply "limits for induced and contact currents as a means of controlling potentially harmful exposure to RF fields," but FCC also noted that due to measurement problems of this RF hazard that FCC would not include requirements to protect from it:

> "Although we are not adopting limits for induced and contact currents in this proceeding, we recognize the desirability for limits to be adopted in the future, particularly if more accurate measuring instruments become available." [Notice FCC 96-326, par. 147]

After its First Order was issued in August 1996, the Ad-Hoc Association and several other parties submitted, in accordance with 47 U.S.C. 405, a Petition for Reconsideration to FCC seeking specific modifications of its First Order [Opinion A-4, and see petition at JA 0869-0906 with exhibits at 0907-0974 .

There FCC found it that 'health effects' were within

the scope of 'environmental effects' and that it would apply its preemption authority as provided in 47 U.S.C. 332 (c)(7)(B)(iv). [FCC 96-326, par. 164-168].

Requests that FCC adopt the requirement that RF exposures from the facilities of its licensees be kept "as low as reasonably achievable were made [JA , JA] and noted by FCC [Notice FCC 97-303, par. #25]. FCC rejected requests for more stringent rules requested by Mr. Fichtenberg, Ad-Hoc Association, and other parties. [Notice FCC 97-303, 29-39.]

In its Second Memorandum Opinion and Order (2MOO) that appeared in notice FCC 97-303 in 12 F.C.C. Rcd. 13494 (1997), FCC left substantially unchanged its RF guideline exposure limits, including FCC not protecting from induced and contact current hazards that FCC recognized existed [see above comment on FCC 96-326, par. 147]. Recognizing its RF guidelines did not protect from this hazard, FCC nevertheless reported,

"There is no evidence to suggest that transmitters or facilities that comply with our new guidelines will cause adverse health effects." [Notice FCC 97-303, par. #111]

FCC also dismissed claims of Mr. Fichtenberg that local public health RF exposure regulations of the "operation" of FCC facilities could not be preempted by FCC. [Notice FCC 97-303, par. #78-90]

Case Before the U.S. Court of Appeals for the Second Circuit

The Second Circuit Opinion affirmed the FCC in all respects. Of particular note is the following:

- The Opinion agreed that there was no need for FCC to get advice from its advising agencies on how to re-

spond to submitted public comments and evidence that more stringent RF rules were needed. The Opinion agreed with FCC that since EPA was 'on the verge of issuing its own draft guidelines and was the federally designated expert to monitor RF matters, that FCC could rely on EPA to tell FCC if there was anything new that FCC had not already been advised about from the federal health agencies. [Opinion A10-A11].

- The Court supported [Opinion A11-A12] as within FCC discretion the FCC reversing its requirement in ANSI C95.1-1982 that RF exposure be kept as low as reasonably achievable [App. B-??].The Court also agreed that FCC's explanation that it balanced factors weighing public health risks against the desires of efficient telecommunications services was a sufficient explanation.

- The Court agreed with FCC both on its reasons for not protecting from the known hazards of induced and contact currents [Opinion A??] and also with FCC's conclusion that there was no evidence of harm if its RF exposure guidelines were followed, permitting the FCC essentially finding of no significant impacts [FONSI] if its guidelines are followed.
- The Opinion likewise agreed that Congress intended that FCC preemption authority included 'health effects' [A??] and that FCC had the authority to preempt local public health RF exposure regulation of the operation of FCC facilities.
- It said there was no 10th amendment violation because local jurisdictions were not required either to approve or deny siting permits. [Opinion A??]

REASONS FOR GRANTING THE WRIT

The first reason for granting the writ is that there are key questions of law that impact not only this decision, but have far reaching implications regarding:

- considering public comment when rule-makings are mainly based on advising expert agencies

- the vitality of formal NEPA regulations

- if federal preemption authority can be delegated to agencies who have little knowledge on the matter to be preempted (regardless of Congress's specificity of the purpose guidelines for exercising the preemption, and when the preemption touches on protecting health and safety

As our modern world becomes more technologically sophisticated and disciplines interconnected, it can be expected that federal agencies will lead rulemakings for which they are not expert and where their decisions can impact on human health and/or the environment.

In the tangled web of interagency decision making the above issues desperately need clarification.

The second reason for granting the writ is that the miracles and benefits of the wireless telecommunications revolution is on the same par as the invention of the wheel, agriculture, the machines of the industrial revolution, the car and telephone, and computers. As with these technological benefits there are also hazards.

The Opinion noted there was conflicting evidence of adverse effects [A]. Briefs will give even more evi-

dence that there is a real cause for concern for the public health. Given the enormity of the impact of this new technology on society, it is extremely important the public and business community are assured that a 'hard look' was given that assures law was properly followed when Congress and the FCC established the framework for the development and expanding of this technology over the coming decades.

It is likely for the next decade or so that there may not be another opportunity to review the rules for build-out of this technology and how it will affect the exposure of the public via cellular phones or base station facilities near homes or workplaces. Also, since the build-out is happening now, this is the most timely time to address this matter before even more is built that may later need to be changed.

With regard to the particular questions raised, please consider:

Question #1: On 'dodging public comment'

This court ruled "The agency must examine the relevant data" [Motor Vehicle Mfrs. Assn. vs. State Farm Mutual, 49 U.S. 29, 43]. When a non-expert agency depends on advising experts, then it must ask these experts for advice on how to respond to public comment, thereby providing the agency a way to "examine the relevant data." [Motor Vehicle Id. 43]

Likewise, NEPA requires, "[Agencies shall] Make diligent efforts to involve the public in preparing and implementing their NEPA procedures. [42 CFR Chapter V, 1506.??]. Clearly taking all public comment on a major element of the rule-making and 'putting it in a closed box'

without any meaningful consideration is the exact opposite of this requirement – and clearly NEPA rules anticipate non-expert agencies being advised by expert federal agencies like EPA.

If EPA were to have issued a Notice of Proposed Rule Making similar to that of FCC, EPA could not ignore all public comment questioning its decision and providing evidence for more stringent rules. EPA could not say,

"We are expert, have an unlimited budget so we can get and study all pertinent publications, and never misunderstand or overlook any important point – so we are ignoring public comment." All the more so would such agencies need to respond if they were merely "on the verge" of issuing internal draft guidelines.

So the FCC and Opinion rationale is contrary to law, and if allowed to stand could allow non-expert and expert agencies together to dodge having to respond to public comment. This is unlawful and contrary to the principles of democratic government.

Likewise, in 47 U.S.C. 405, Petition for Reconsideration, Congress explicitly provided for considering of new information by the FCC, an agency which must address rapid technological development.

Question #2: On reversing past safety regulation and Congressional policy in statute.

It is a very simple matter to verify that previous FCC RF guidelines of ANSI 1982 provided for following the "as low as reasonably achievable" (ALARA) policy and that FCC adopted this policy to apply during a transition period. 47 USC 324 described above arguably is similar, if not identical to the ALARA policy.

This Court has stated,

"[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." [Motor Vehicle Id. 42.

Moreover, FCC's reversal of its ALARA policy is arguably contrary to the policy of Congress in 47 USC 324 noted above that all radio facilities must make decisions so that the RF power they need is minimized. This is all the more reason FCC needs to explain its reversal and how it is consistent with the long-standing policy established by 47 U.S.C. 324.

Finally, the Court accepted FCC's explanation by FCC merely reciting the words that it sought " a proper balance" for protecting the public and worker health vs. efficiency of telecommunication services. [Notice 97-303, par. #2].

This Court has noted,

"[That policy making must account for uncertainty] does not imply that it is sufficient for an agency merely to recite the terms 'substantial uncertainty' as justification for its actions." [Motor Vehicles Id. 52]

Does FCC merely reciting it sought "a proper balance" also qualify a merely reciting empty phrases. For nowhere does FCC document what factors were put in its "balance", how it was done or what were the results. To verify this the Court needs merely to turn to the context of the FCC defense at Notice 97-303, par. #2.

Similarly, in the tangled-web of interagency advisors, we find the FCC and the Second Circuit Court [at A11] relied on the EPA assessment that the "[RF health' effects information is not yet sufficient to be used as an exposure criteria to protect the public against adverse human health effects [of RF]".

If EPA were to have issued its own regulations with a justification that recited "not yet sufficient information" would this Court reject this reciting as it did the term "substantial uncertainty" in Motor Vehicles above? [Id. at 52]

Can advising agencies thus recite assessment opinion without documentation, and then allow public comment to be ignored, shielding the advising agency from responding, and still having its opinion drive a rule-making decision?

EPA offered no analysis, no data, no documentation, and of course there was none for the Opinion to cite [see A11].

Does the mere reciting of "proper balance" by FCC and "not yet sufficient information" by advising EPA merit the same response of this Court as in Motor Vehicles which stated,

"unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion." [Motor Vehicles Id. 48]

Just how the Court will make requirements for actions when there is a tangled web of non-expert lead agencies relying on expert agencies is therefore in much need of resolution by this Court.

The issue chosen to examine this, whether the FCC properly reversed its ALARA policy through a "proper balance" is worthy of this Court's attention. This is because the continuance of this FCC previous policy and policy in 47 USC 324 can play a major role in driving the development of an effective wireless telecommunications infrastructure that includes the beneficial high quality service of providing products and ambient RF exposure that is as low

as reasonably achievable. This effort to minimize RF exposure may indeed be considered as one of the improvement in high quality services the Telecommunications Act of 1996 sought.

Question #3: Did FCC do a functionally equivalent NEPA? Is this even an option for agencies not expert in the health or environment matter of the rule-making?

As noted above per Question #1, NEPA requires involving the public which did not happen here – since public comment how RF health adverse effects evidence supported more stringent rules was ignored.

It is still worthwhile to note that the Opinion found as justifying the 'functional equivalent' argument the standard of the Court of Appeals for the District of Columbia. The Opinion noted that "when an agency is engaged primarily in an examination of environmental questions" and also meets other criteria, that it may meet its NEPA compliance by actions that are 'functionally equivalent' to NEPA.

The Opinion also noted that FCC has no health or environmental expertise. If agencies without acknowledged expertise in health or environment are yet found to be "engaged primarily in an examination of environmental questions" – then 'black is white', 'up is down' and the viability of Congress' policy for formal NEPA requirements is dead.

Because of the enormity of impact on the death of NEPA this decision may have, this question is also worthy of the being considered by this Court.

Question #4: Was there a proper delegation of author-

ity to FCC to preempt either environmental or health effects per 47 U.S.C. 332(c)(7)(B)(iv)?

The Supreme Court recently gave the applicability of J.W. Hampton, Jr. & Co. v. United States a new vitality when it recently cited the case in Mistretta v. United States, 488 U.S. 361 (1989). In Hampton the Court states,

"If such a power [fixing railway rates] is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject * * *" [Hampton Id. at 408]

If such is the requirement of preemption power to fix railway rates, all the more so it applies when preempting local regulations to protect public health or the environment.

This makes sense. We do not ask a computer programmer to do a heart surgery, no matter how many doctors he may consult. Only experts in a subject can best understand the information they are given, say through public comment, and how best to consider and apply it. All the more so in our technological age, must Congress delegate any preemption authority only to those who are expert on the subject.

Question #5 Are 'health effects' part of 'environmental effects?' for the purposes of FCC preemption authority in 47 U.S.C. 332(c)(7)(B)(iv).

This Petition adopts the same statements of the Case and Reasons for granting the requested writ on this question as Petitioner Michael C. Worsham in his timely filed petition on this question , and in the interests of efficiency his text will incorporated here by reference to his petition for writ in this same matter.

It should be emphasized that no doubt some members of Congress sought to preempt local health regulations through innuendo and implication by use of the more amorphous phrase 'environmental effects'. We need to call a dog "a dog" and a cat "a cat". If members of Congress intend to preempt regulations to preempt protecting the public health of their constituents, then they must do so openly and clearly, and not 'hide behind' vague terms like 'environmental effects' which in three court decisions was interpreted differently.

(1) One court said the term "environmental effects" was undefined in the above preemption section. [Freeman v. Burlington Broadcasters, Inc. 204, F3d 311 (2nd Cir. 2000] see Michael Worsham petition on section Coflicting Federal Court Decisions)

(2) One court stated that, "While it is clear from the record that the City of Moline considered potential health effects of the tower, it is less clear that they considered environmental effects." [Iowa Wireless Services, L.P.v. City of Moline, Ill. 29 F.Supp. 2d 915 (C.D. Ill, 1998).

(3) The Opinion in the instant case stated its agreement with the FCC interpretation that the statute in question preempted local regulation of RF "on the basis of the health effects of RF radiation." [Opinion A5]. As noted by Mr. Worsham, while federal agencies have discretion to imply meaning to vague phrases, this discretion is curbed when the Act establishing the statute forbids implied preemption, as does Sec. 601. Also this Court has curbed agency discretion to imply preemption of local health and safety regulations, and instead has insisted on a higher standard where Congress must explicitly preempt.

> "As a matter of statutory construction, congressional intent to displace local laws in the exercise of

the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuassive of the statutory purpose. This is especially the case when public safety and health are concerned." [Mauer vs Hamilton, 309 U. S. 598, 614; 84 L.Ed 969, 980]

"Where . . . the field that Congress is said to have preempted has been traditionally occupied by the States 'we start with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." [Hillsborough County v. Automated Medical Labs, 471 U.S. 707; 85 L. Ed. 2d 714, 722 (1985)

Although federal courts may disagree how to apply law, which a higher court may resolve, here we have examples of courts disagreeing on what a word. This is clear evidence that meets the standard that,

"A statute will be held void for vagueness if the conduct forbidden by it is so unclearly defined that persons of common intelligence must necessarily guess at its meaning and differ as to its application."

[Connally v. General Construction Co. 285 U.S. 385]

"Regulation is void for vagueness if it is so indefinite that ordinary people cannot understand that which it prohibits." [Pro-choice Network v. Schenck, 67 F.3d 359, vacated in part on rehearing en banc 67 F3d 377, certiorari granted 116 S.Ct. 1260, 134 L.Ed. 2d 209, affirmed in part, reversed in part 117 S.Ct. 855, 137 L.Ed 2d. 1.]

"Regulation is unconstitutionally vague if it fails to

give a person of ordinary intelligence reasonable opportunity to know what is prohibited." [Thomas v. Hinson, 74 F3d. 888 (8th Circuit, 1996]

Moreover, when we look at the legislative record, we see enough signs and 'muddy waters' so that the required 'clear intent' of Congress is missing. Specifically:

- Congress did not preempt the entire field of RF exposure control as some parties wanted, but only of 'personal wireless services.'
- As we move from the House version of the preemption to the Joint House/Senate compromise Conference Report, we find a clear move away from preempting local public health regulations.

Specifically, The House Report sought "uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible." [H. Rep. 104-204, 104th session 94-95 (1995).

However, in the Joint Senate House Conference report all mention of health and safety was removed. Thus, the intelligible principle for preemption in the House Report was removed – with nothing to take its place except that FCC should finish its NEPA rule-making. This only required the FCC to consider environmental impacts, but gave no intelligible principle on how to apply its findings for decision making.

Question #6: Did the FCC preemption violate the 10th amendment due to commandeering the states and local jurisdictions to run a federal program?

Choice ends where liability begins.

In New York vs United States 505 U.S. 144 (1992) this Court decided that when a party has either the option of being forced to run a federal program or take on a liability (title to nuclear waste) then the result is commandeering of state or local government. In Petersburgh Cellular Partnership v. Board of Supervisors, 205 F.3d 688 (4th Cir. 2000) Circuit Judge Niemeyer explained the disastrous consequences of a jurisdiction abandoning the field of zoning and permitting wireless telecommunications facilities. Moreover, not only would there be a high risk for a deterioration neighbor quality of life and consequent property value, but also of danger to life and property due to falling towers or, more likely, electrical fire due to not inspected electrical systems. Since such dangers of risk to property are so obvious and there is no benefit to the community by so abandoning, that any jurisdiction that reverses its present course of zoning and permitting such facilities puts itself at liability risk [see extensive discussions in Owen v. City of Independence, 445 U.S. 622 (1980); Paratt v. Taylor 451 U.S. 527 (1981) and City of Canton v. Harris, 489 U.S. 378 (1989) discussing 'deliberate indifference'. Thus, the typical immunity that local jurisdictions enjoy when making policy decisions is lost when the dangers are clear and the benefits nil from abandoning zoning and permitting of wireless facilities.

Such lack of real choice amounts to de facto commandeering. Moreover, since there is no federal zoning and permitting program the following applies:

"In view of the efforts of governmental bodies everywhere to mitigate the destruction of life, limb, and property resulting from the use of motor vehicle, it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal meas-

ure found suitable to put in its place. H.P. Welch Co. v. New Hampshire, 306 U.S. 79-85 83 L.Ed 500 at 505.

Also consider Printz v. United States, 521 U.S. 898 (1997). It would have made no difference in the Supreme Court's decision had Congress passed an act of slightly different wording – such as that the States were commanded, that "if they had a Chief Law Enforcement Officer (CLEO), then the Brady Act requirements (found unconstitutional) would be required.

Would the Second Circuit say there is a choice to abandon law enforcement to avoid the act's requirement if there is a CLEO and so there is no real commandeering? Such abandonment of law enforcement is no real choice. The Second amendment notes that a militia is "necessary to the security of a free State." [App. B-??]. Just as the chaos due to no law enforcement endangers the security of a free State, so too would the chaos that Judge Niemeyer describes.

There are examples of many court cases where federal district and appellate court decisions that find local jurisdictions applied RF health considerations more stringent than those of the FCC and so denied a permit – and provided relief by compelling the permits be issued.

See Cellular Telephone Co. v. Town of Oyster Bay, 166 F.3d 490 (2nd Cir. 1999); Iowa Wireless Services, L.P. v. City of Moline, Ill. 29 F.Supp. 915 (C.D.Ill 1998); Omnipoint Corp. v. Zoning Hearing Bd. Of Pine Grove, TP 20 F.Supp. 2d 875, 881-92 (E.D. Pa. 1998); Illinois RSA No. 3 v. County of Peoria, 965 F. Supp. 732, 747, (C.D. Ill. 1997); BellSouth Mobility Inc. v. Gwinnett County Georgia, 944 F. Supp. 923, 929 (N.D. 1996).

One would think in such case, the Court might rule the jurisdiction's denial void and to either: (1) allow the wireless facility to be constructed without any governmental supervision, as the Opinion suggests is the 'choice' of local jurisdictions. But, as noted this is no real choice that any responsible person could make, and of course including the courts.

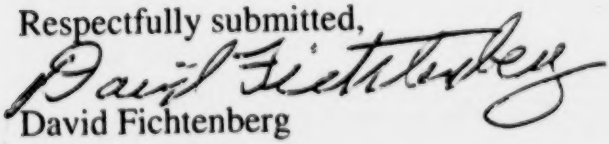
Or the courts might designate a federal agency to run a federal program to review the zoning and permit issues, assuring safe construction, etc.

But, as Seymour and Clines show, the courts have compelled the local jurisdictions to issue the permits, and allows the federal government to stand back while local officials are commandeered and take the anger of their constituents. This is exactly what New York and Printz said was unconstitutional commandeering.

Conclusion:

For the above reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,



David Fichtenberg

Date: September 13, 2000

APPENDIX B

15 U.S.C. Sec. 2602(6):

> The term "health and safety study" means any study of any effect of a chemical substance or mixture on health or the environment or both, including underlying data and epidemiological studies of occupational exposure to a chemical substance or mixture, toxicological clinical, and ecological studies of a chemical substance or mixture, and any test performed pursuant to this chapter.

42 U.S.C. Sec. 2021(h):

Consultative, advisory, and miscellaneous functions of Administrator of Environmental Protection Agency. The Administrator of the Environmental Protection Agency shall consult qualified scientists and experts in radiation matters, including the President of the National Academy of Sciences, the Chairman of the National Committee on Radiation Protection and Measurement, and qualified experts in the field of biology and medicine and in the field of health physics. The Special Assistant to the President for Science and Technology, or his designee, is authorized to attend meetings with, participate in the deliberations of, and to advise the Administrator. The Administrator shall advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards and in the establishment and execution of cooperation with States. The Administrator shall also perform such other functions as the President may assign to him by Executive order.

42 U.S.C. Sec 7412(a) subsections (6) and (7)

(6) Hazardous air pollutant. The term ``hazardous air pollutant'' means any air pollutant listed pursuant to subsection (b) of this section.

(7) Adverse environmental effect The term ``adverse environmental effect'' means any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.

42 U.S.C. Sec. 7412(b)(2):

(2) Revision of the list The Administrator shall periodically review the list established by this subsection and publish the results thereof and, where appropriate, revise such list by rule, adding pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise, but not including releases subject to regulation under subsection (r) of this section as a result of emissions to the air. No air pollutant which is listed under section 7408(a) of this title may be added to the list under this section, except that the prohibition of this sentence shall not apply to any pollutant which independently meets the listing criteria of this paragraph and is a precursor to a pollutant which is listed under section 7408(a) of this title or to any pollutant which is in a

class of pollutants listed under such section. No substance, practice, process or activity regulated under subchapter VI of this chapter shall be subject to regulation under this section solely due to its adverse effects on the environment.

Telecommunications Act of 1996, PL 104-104

To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies. [from Introduction]

47 U.S.C. Sec. 253(b):

State regulatory authority: Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

47 U.S.C. 324 Use of Minimum Power

In all circumstances, except in case of radio communications or signals relating to vessels in distress, all radio stations, including those owned and operated by the United States, shall use the minimum amount of power necessary to carry out the communications desired.

47 U.S.C. Sec. 332(c)(7)(B)(iv) (established by the Telecommunications Act of 1996, Sec. 704):

No state or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless services facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

47 U.S.C. 405 Petition for Reconsideration; procedure; disposition of time of filing; additional evidence; time for disposition for reconsideration of order concluding hearing or investigation; appeal of order

47 U.S.C. 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order.

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any

manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of. (b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying

such petition. (2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

Telecommunications Act of 1996, Sec. 601(c):

Federal, State, and Local Law. – (1) No implied effect. – This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

APPENDIX C – Letters and Miscellaneous Documents

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C.
May 19, 1999

Office of
Air and Radiation

Arthur Firstenberg
President, Cellular Phone Taskforce
Post Office Box 100404
Vanderveer Station
Brooklyn, New York 11210

Dear Mr. Firstenberg,

I am writing in response to your letter of May 10, 1999, in which you asked whether the Environmental Protection Agency (EPA) has ever received a request from the Federal Communications Commission (FCC) asking EPA to evaluate, with regard to health implications of exposure to radiofrequency radiation, the documents that exist in the FCC's Notice of Proposed Rulemaking of April 1993, or after the final rule was issued in August 1996.

To my knowledge, the FCC has not asked EPA to review and evaluate any of the materials in the FCC's docket ET-93-62, other than the April 1993 Notice of Proposed Rulemaking (NPRM), Guidelines for Evaluating the Environmental Effects of Radiofrequency 1993 letter from Margo T. Oge, Director of Radiation and Indoor Air, to

Thomas P. Stanley, Chief Engineer, Office of Engineering and Technology. EPA's November 1993 comments are appended.

I hope that this information has been responsive to your letter.

Sincerely yours,

/s/ Norbert N. Hankin

Norbert N. Hanking

Environmental Scientist – Radiation

Office of Radiation and Indoor Air (6604J)

App. C-2

STATE OF WASHINGTON
SECRETARY OF STATE

I., Ralph Numro, Secretary of State of the State of Washington and custodian of its seal, hereby issue this

CERTIFICATE OF EXISTENCE/AUTHORIZATION

OF

AD-HOC ASSOCIATION OF PARTIES CONCERNED ABOUT THE FEDERAL COMMUNICATIONS COMMISSION'S RADIO FREQUENCY RADIO FREQUENCY HEALTH AND SAFETY RULES.

I FURTHER CERTIFY that the records on file in this office show that the above named nonprofit corporation was formed under the laws of the State of Washington and was issued a Certificate of Incorporation in Washington on June 6, 1997.

I FURTHER CERTIFY that as of the date of this certificate, no Articles of Dissolution have been filed, and that the corporation is duly authorized to conduct affairs in the corporate form in the State of Washington.

| SEAL of the | Date: September 12, 2000

| State of Washington|
|_____|

Given under my hand and the seal of the State of Washington at Olympia, the State Capitol

By /s/ Ralph Munro
Ralph Munro, Secretary of State

Supreme Court, U.S.
FILED
OCT 5 2000
CLERK

(2) (2) (2)

No. 00-0407, 00-0417, 00-0427

IN THE

SUPREME COURT OF THE UNITED STATES

David Fichtenberg,
Micahael C. Worsham,
Cellular Phone Taskforce,

vs.

Federal Communications Commission and the United States of America, Respondents

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On Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

Bill Jenkins, Respondent, Pro Se
PO Box 112
Cosmopolis, Washington 98537
Telephone: (360) 532-8690

85pp

QUESTIONS PRESENTED

1. Whether comment on a matter that would lawfully require consideration when the lead agency in a rule making has expertise in the matter also requires such consideration when the lead agency does not have such expertise?

2. Whether the Federal Communications Commission ("FCC") lawfully reversed previous requirement that radio frequency (RF) radiation from its facilities be as low as reasonably achievable, considering 47 USC 324 requirements that radio stations use minimum power necessary for the desired communications?

3. Whether lead agencies not expert in a health or environment matter may follow procedures 'functionally equivalent' to the National Environmental Policy Act (NEPA) and so avoid their formal NEPA requirements, and whether FCC did so?

4. Whether an agency may have delegated authority to preempt state or local public health regulations on a matter when that agency does not have expertise in that matter, when expertise is otherwise lacking, or when the preemption delegation lacks a standard?

5. Whether FCC may imply "environmental effects" in 47 USC 332(c)(7)(B)(iv) includes "health effects", since PL 104-104 sec. 601 prohibits implied preemption and sec. 253(b) provides for States protecting public safety?

6. Whether Congress in 47 U.S.C. 332(c)(7)(B)(iv), by preempting local jurisdictions from regulating RF radiation, gave jurisdictions 'no choice' but to implement FCC rules, or to be compelled if they refused, has de facto commandeered states or local jurisdictions to run a federal program, in violation of the 10th amendment?

LIST OF PARTIES

List of Parties in proceeding below is given in the List of Parties section in each of the petitions 00-0393, 00-0407, 00-417, and 00-427.

Parties supported by this brief in support are David Fichtenberg (#00-0407), Michael C. Worsham (#00-0417), and Cellular Phone Taskforce ("CPT") (#00-0427).

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Opinions Below

In addition to reports in petitions supported, note that the Federal Communications Commission ("FCC") First Order in Notice 96-326 reported at 11 F.C.C. Rcd, 15123 (1996) established a 'transition' period. During this time previous FCC RF guidelines for station applications continued in effect [sec. 47 CFR 1.130(b)(4)]. 47 CFR 1.1307(b)(4)(i) continues in effect for certain services "Radio Frequency Protection Guides" recommended in the "American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz" (ANSI C95.1-1982). For other services 47 CFR 1.1307 (b)(4)(ii) continues the RF guideline "IEEE C95.1-1991 (ANSI C95.1-1992) Safety Levels With Respect to Human Exposure To Radio Frequency Electromagnetic Fields 3 kHz to 300 GHz." These were lodged with the Court with petition #00-0407.

Jurisdiction

This brief is in support of certain petitions for writ of certiorari and is being filed pursuant to Rule 12.6 and Rule 24.2. It regards request of the judgment of the U.S. Court of Appeals for the Second Circuit in consolidated cases 97-4328 (L), 98-4003(Con.), 98-4005(Con.), and 98-4122(Con.). The original opinion is reported as *Cellular Phone Taskforce et al. v. FCC*, 205 F.3d 82 (2d Cir. 2000). The petitions supported are the petitions for certiorari of David Fichtenberg (Docket #00-0407), Michael C. Worsham (Docket # 00-0417) both docketed September 15, 2000, and in support of CPT (Docket #00-0427) docketed September 20, 2000. This brief is being filed on October 5, 2000 which is within the 20 day period

for filing provided by Rule 12.6.

This brief does not address support for the petition of Citizens For Appropriate Placement for Telecommunications Facilities et al. ("Citizens"), docket #00-0393, docketed September 13, 2000, because the date for formally expressing such support has past. I am an individually named party in the above named Court of Appeals case, with my name appearing on page 6 of the Court of Appeals docket report, and shall limit comments to additional points not in petitions already filed with the Court.

Certain affidavits, including those presented or referenced in the proceeding below are discussed further in Statement of the Case. Parties submitting these affidavits indicate how they are adversely affected by the challenged rulemaking. A favorable ruling by this Court would provide them significant relief.

Hearing Examiner documents at p.62-68 pertain to Mr. Fichtenberg's role as spokesperson for organizations in Seattle, Washington. 1996-present [see his petition at 11-15.]. Mr. Fichtenberg is President of Ad-Hoc Association of Parties Concerned About the FCC RF Health and Safety Rules (AHA), a party in the proceeding below. Its standing is discussed at p2-7 in the principal brief joined by all petitioners below, except CPT [see J.Hobson letter at 60]. Harms to AHA's mission impact Mr. Fichtenberg whose duties are to further it.

Constitutional and Statutory Provisions

In addition to the constitutional and statutory provisions already noted in the Petitions, 42 USC 1983 [p. 37], 47 USC 332(a) [p. 44] and (c)(3)(A) are relevant. [p. 44]

Statement of the Case

Reference to pages of the Joint Appendix in the proceeding below are designated by "JA". Reference to the briefs joined by all petitioners, except CPT, are designated as "Joint Petitioners or "JP".

Affidavits submitted and lodged with the Court:

A. During the proceedings below affidavits of the following parties in the Citizens petition were submitted or referenced (page nos. are of pages in copies of affidavits lodged with the Court:

CPT members Frank Goodrich of Texas (21), Marija Hughes of Washington D.C. (39) in exhibit of April 19, 1998 CPT motion for partial stay. Janet Newton (4), Dale Newton (5) Roger Knolton (6) and Lorinda Knolton (7) of Vermont, in April 29, 1998 Comments supporting motion for partial stay

B. Sixteen additional affidavits indicating they are members of CPT were submitted in a CPT April 19, 1998 motion for partial stay and include persons from the following States: Vivian Ferguson (18) and Eldfrid Bowron (20) of Washington; Muriel Anrow (28), Martha Winsten (30), Arthur Firstenberg (11), June Reiber (66) and Janet Ostrowski (90A) of New York; Charles Mainville (32) of Maine; Hal Rudnianin (34) and Alison Rall (37) of Michigan; Derek Bishop (35) of Hawaii; Alice Beougher (41) of Ohio; Lucinda Grant (54) and Susan Malloy (87) of Arizona; and Regina Siberski (68) and Kathleen P. Hawk (73) of Pennsylvania.

These show harms for which relief will be provided by a favorable ruling. See examples at p.57-8. The symp-

toms in many of these affidavits are similar to those EPA described (and was reported in the proceeding below.) EPA noted that complaints of symptoms attributed to RF exposure such as nausea, headaches, dizziness, pain in the eyes, ringing of ears, screeching and sizzling sounds, and irregular heartbeat are described collectively by the term "electrosensitivity." [JA 5538-39], JP Reply at 39. Also filed is affidavit of Michael C. Worsham, regarding its mention in JP principal brief of May 22,1998, and affidavit of D. Fichtenberg regarding its mention in JP Reply brief of July 27, 1998. His supplementary affidavit that I requested is at p.58.

Statement of case regarding Question #2:

Whether the Federal Communications Commission ("FCC") lawfully reversed previous requirement that radio frequency (RF) radiation from its facilities be as low as reasonably achievable, considering 47 USC 324 requirements that radio stations use minimum power necessary for the desired communications?

Keeping exposure as low as reasonably achievable is referenced in a petition for reconsideration to FCC of Ad-Hoc Association and other parties in the Joint Appendix ("JA") of the proceeding below at JA 0892 and in ex parte comments at JA 1359-62, at JP brief at 31. 47 USC 324 requires that radio stations shall use the minimum amount of power necessary to carry out the communications desired. (see text at David Fichtenberg (DF) petition at 21, and JP brief at 33.)

Judicial history:

1926 Attorney General Opinion:

The Attorney General issued an opinion regarding Regulation 14 of former Sec. 54 of Title 47, "the Secretary of

Commerce was not given power to determine in advance what this minimum amount should be for every case, and therefore he had no authority to insert such a determination as a part of any license." [1926, 35 Op.Atty.Gen. 126]

The Harvit et al. case:

The case of *Harvit Broadcasting Corp.* et al. is reported in Notice FCC 75R-344 reported in FCC Reports, 55 F.C.C. 2d 298, adopted August 21, 1975, Released September 17, 1975. In *Harvit* the Administrative Law Judge William Jensen concluded that applications by two broadcast companies should be denied, per 47 USC 324, in part because they were using excessive power for their coverage area. FCC overturned Judge Jensen's decision. FCC reversed the decision and reported,

"We agree with the Broadcast Bureau that the minimum power requirement of Section 324 was taken into consideration by the Commission at the time it established its Table of FM Channel. Assignments pursuant to Sections 303 and 307(b) and that these assignments [section references omitted] were designed to insure the fair, efficient, and equitable distribution of radio service among the several States and communities. To hold otherwise is to assume that the Commission acted in violation of Section 324 when the FM Assignment Table was established." [*Harvit* Id. 300]

FCC previous rules included keeping RF exposure as low as reasonably achievable

Joint Petitioners [JP Reply at 14] noted the relevant section of the previous FCC RF standard which states,

"Because of the limitations of the biological effects data base, these guides are offered as upper limits of exposure, particularly for the population at large. Where exposure conditions are not precisely known

> or controlled, exposure reduction should be accomplished by reliable means to values as low as reasonably achievable." [ANSI C95.1-1982, Section 5. Explanation, page 11. Document lodged with the Court by petitioner D. Fichtenberg, Docket 00-0407].

The Second Circuit Opinion notes that the previous FCC RF guidelines were those of ANSI C95.1-1982. [A11-A12].

FCC issued its OST bulletin No. 65, to explain to its licensees how they can comply with the FCC adopted ANSI RF standards. It was released in October 1985. In its section "ANSI Protection Guides for Exposure to RF Radiation" describing the ANSI 1982 requirements, FCC explicitly notes the above paragraph and states,

"Because of 'limitations in the biological effects data base," ANSI stated that 'these guides are offered as upper limits of exposure, particularly for the population at large.' ANSI further advised that, '[w]here exposure conditions are not precisely known or controlled, exposure reduction should be accomplished by reliable means to values as low as reasonably achievable." [see OST Bulletin No. 65, p. 5-6, lodged with the Court with D.Fichtenberg Petition #00-0407].

Statement of case regarding Question #4:

Whether an agency may have delegated authority to preempt state or local public health regulations on a matter when that agency does not have expertise in that matter, when expertise is otherwise lacking, or when the preemption delegation lacks a standard?

In addition to the factual comments in the filed petitions pertaining to this question, there are addition facts that

pertain to the RF expertise of the federal health agencies during the time period of the FCC rule making. These facts indicate that even the 'expert' agencies did not have the knowledge to advise what RF limits should be for conditions of chronic exposure to RF.

In 1993 FDA wrote the FCC with regard to its proposed RF standard, IEEE C95.1-1991 (ANSI C95.1-1992). FDA said,

"With respect to the specific levels cited in the standard for Maximum Permissible Exposures and SARs. CDRH has in the past expressed concern about the 1992 guidelines. The standard, as written, lacks a full explanation of its basis. In our opinion, it is unclear what types of biological effects and exposure conditions are addressed by the standard. For example, very few research studies of long-term, low-level exposures of animals were included in the standard, despite the existence of studies that suggest an association of cancer development. Other studies have been published since finalization of the standard that strengthen this concern.

In addition, there have been insufficient studies of the health of humans who have been exposed to RF for several years or more. Although the current state of scientific knowledge does not enable us to offer a specific alternative to the exposure levels in the new standard, we do not believe this standard addresses the issue of long-term, chronic exposures to RF fields. (emphasis added).

[Letter of November 10, 1993, from Lillian J. Gill, Interim Director, Office of Science and Technology, Center for Devices and Radiological Health (CDRH) to Mr. Thomas P. Stanley of FCC. Letter in Joint Appendix of proceeding below at JA 0450-0451].

Similarly, in its 1996 letter to FCC, FDA reminded the FCC of its 1993 comments and stated,

"We also stated that we did not believe that C95.1-

> 1992 addresses the issue of long-term, chronic exposures to RF fields, and that the relevance of such questions would only increase as the use of portable and hand-held devices grows." [July 17, 1996 letter of E.D. Jacobson to FCC, at Second Circuit Joint Appendix 0616.]

Likewise, at a March 21, 1995 meeting with FCC, EPA outlined its plans for issuing RF guidelines. There it indicated that its first guidelines would be "Interim" and would "not include modulation, chronic exposure, nonthermal effects," [JA 0564, JA 0567] and that this would be addressed in a subsequent 'phase 2' EPA "final" exposure guideline. [JA 0566].

Consistent with the above, the Court of Appeals noted,

> "the parties do not dispute that RF radiation at excessive levels has thermal effects and that the ANSI and NCRP standards and thus the [FCC] Guidelines are premised on such effects." [A8]

Thus, the federal health agencies did not view the FCC RF guidelines as addressing the chronic exposure situation.

Facts on how FCC exercised its delegated authority relative to advice from federal health agencies on 2 key questions:

- **(a) What should be the RF exposure limits in public thoroughfares (sidewalks, parks, bus stops, etc.)?**

- **(b) When should cellular phone and other manufacturers of hand-held wireless phones be able to avoid evaluating if their products exceed safety limits?**

Whether FCC properly exercised its delegated authority may arguably be considered by considering facts on the extent FCC deferred to advice from the federal health agencies on the 2 key questions above. In its Brief FCC informed the

Second Circuit "shortly before the RF Order was issued, the FCC contacted each of the agencies, outlined the planned response to their comments, and solicited further input."[FCC Brief at 18] and then gave details [FCC Br. 18]. A close examination shows that the "planned response" was significantly changed when the final order was issued. Here are the specifics.

On July 1, 1996, FCC Chairman Reed Hunt sent a communication to EPA describing its proposed rules [see p.69 and JA 0614]. On July 2, 1996 Mr. Richard Smith, Chief of FCC Office of Engineering and Technology sent a similar letter to FDA [see p.72 and JA 616]. In both of these communications FCC staff indicated they proposed an approach that generally incorporated elements from both ANSI/IEEE and NCRP, and included:

1) "adoption of limits for field strength and power density limits based on *NCRP recommendations;"*

* * *

3) "deferring adoption of the ANSI/IEEE radiated power exclusion clause pending possible *future* consideration of a modified version.;"
[This means that FCC says it will defer adopting a provision that would allow manufacturers of certain 'low power' cellular phones or other devices to exclude themselves from having to evaluate if a particular product design could result in exceeding the FCC RF safety limits.] [emphasis added]

Subsequently, Arthur Firstenberg, who is President of petitioner Cellular Phone Taskforce, noticed that the actual text of the draft proposal to which FCC referred in its above

letters to EPA and FDA and to which the federal health agencies responded did not appear in the public record. Under a Freedom of Information Act (FOIA) request, he asked FCC for a copy of this draft proposal and FCC refused this request [see CPT Reply brief at 25-26, and its addendum B40-44 for A.Firstenberg's FOIA request and B45-47 for FCC's reason for refusal. Also see FCC refusal letter herein at p.80-83, especially see underlined text at p.83.]

In FCC's discussion of its refusal to release the document to which the federal health agencies responded, FCC said,

"The Report & Order [First Order] that was eventually adopted may differ in some respects from the document in question because it incorporates comments received from the Commissioners as well as staff of this agency and the staffs of some of the other agencies which received the draft pursuant to the IRAC [Interdepartment Radiation Advisory Committee] consultative process." [CPT Reply, addendum B-47, and herein at p.83]

What FCC First Order (Report & Order) actually provided regarding 1) and 3) above:

Facts regarding adoption of NCRP limits for field strength and power density [point 1)]:

When FCC released its First Order [notice FCC96-326] on August 1, 1996, it stated, "Specifically, we are adopting limits for field strength and power density that are generally based on Sections 17.4.1 and 17.4.2, and the time-averaging provisions recommended in Sections 17.4.1.1 and 17.4.3. [footnote 1 to par.#1, First Order p. 1, JA 0629 and at p.84]

NCRP RF radiation limits for field strength and power density limits in NCRP 17.4.3 provide that the more restric-

tive general population exposure limits are also to apply to public thoroughfares [through which the public passes in transit] and is to be based upon a persons average exposure over a 30 minute period. Specifically, this section notes:

> "At the same time, the 30-min time-averaging period is responsive to some special circumstances for the public at large. Examples are transient passage by the individual past high-powered RFEM [radiofrequency electromagnetic] sources, and brief exposure to civil telecommunications." [see 17.4.3 at p.79 and JA 0307] [emphasis added]

In its First Order, FCC ruled regarding RF exposure limit guidelines in public thoroughfares:

> "Occupational/controlled exposure will also apply where exposure is of a transient nature as a result of incidental passage through a location where exposure levels may be above general population/uncontrolled limits [which are 1/5th of occupational/controlled limits], as long as the exposed person has been made fully aware of the potential for exposure and can exercise control over his or her exposure by leaving the area or by some other appropriate means." [par. #43 Notice FCC 96-326, at p. 75 and JA 0644].

The above policy ruling was also incorporated into Note 1 to Table 1 of 47 CFR 1.1310 (at p.75 and JA 0721)]

Facts about FCC's First Order regarding FCC deferring adoption of provisions allowing manufacturers to not evaluate if their cellular phone designs result in RF exposure exceeding safety limits [point 3)]

FCC reported that FDA indicated that an appropriate radiated power exclusion level for ensuring that the limit for the public of RF exposure to the head under 'worst case' conditions would be on the order of 180 mW at 900 MHz., where 'mW' is milliwatts of power - a milliwatt is 1/1000th of a

watt. [par. 71, FCC 96-326 (at p.75 and JA0655)].

This means that FDA said that if the amount of output power of a cellular or other hand-held phone is more than about 180 milliwatts of power, then under 'worst case' conditions there is a risk that the head of a user would absorb RF amounts above the safety limits.

FCC said it studied RF exposure from six cellular phone models operating near 900 MHz based on a "standard" operating situation for the position of the phone relative to the head. Based on such study, FCC established for such cellular phones a radiated power exclusion clause that permits manufacturers of cellular phones with less than 570 mW of output power from having to evaluate if their product may result in RF exposure that exceeds safety limits. [see par. 72, 73 FCC 96-326, [at p.76-77 and JA 0655-56].

Reasons For Granting the Petition

Summary of Argument

Pertaining to Question #2:

FCC interpretation of 47 USC 324 is that it requires FCC to establish maximum limits on power, taking 47 USC

324 into account. But this is the opposite of what Congress intended. 47 USC 324's plain sense is that within the maximum power limits FCC may set, each station, on a case by case basis, needs to take steps so that only minimum power necessary is used.

Pertaining to Question #4:

FCC and the federal health agencies acknowledged that they do not have expert knowledge on RF health effects due to chronic exposure, but admit there is evidence of adverse effects - and so could not properly consider this important factor. Hence, there is no proper authority to preempt.

Pertaining to Question #5:

Additional points not in other petitions on why FCC cannot preempt RF regulations to protect health:

- 47 U.S.C. 332(c)(3)(A) supports local regulation
- History of preemption section shows that Senate did not agree with House. Language changes all support that the Senate would not agree to preempt local health regulations.
- The syntax of the preemption, by specifying the condition that local RF regulation must be on the basis of 'environmental effects' implies there are other conditions (health) when preemption is not allowed.

Pertaining to Question #6:

If a local jurisdiction or State abandons regulation of zoning and permitting cellular phone and other personal wireless services facilities, then it would not be immune from likely tort liability suits – since there is no reasonable cause for such abandonment. This risk to liability distinguishes the FCC RF exposure preemption from other seemingly similar preemption cases. The result is the 'choice' between being forced to risk liability or to run the federal FCC RF exposure

program. This is (de facto) commandeering as described in New York v. United States, 505 U.S. 144 (1992)

Argument

Question #2: Whether the Federal Communications Commission ("FCC") lawfully declined to continue its previous requirement that microwave/radio frequency (RF) radiation exposure from its facilities be as low as reasonably achievable and considering 47 USC 324 requirement that radio stations use minimum power necessary for the desired communications?

In formulating 47 USC 324 Congress clearly is not seeking an energy conservation program per se. Rather Congress is trying to minimize any known or suspected adverse effects of radio frequency radiation - which at the time the statute was established was radio frequency interference.

Recall that in *Harvit,* FCC states its maximum power limits 'satisfy' 47 USC 324. FCC claims that,

> "To hold otherwise is to assume that the Commission acted in violation of Section 324 when the FM Assignment Table was established." [Harvit Id. 300]

This makes no sense. FCC sets maximum power limits based on wanting to prevent interference between its licensees and, according to FCC, it also considers the maximum power its licensees may need to cover their desired broadcast area. If we interpret 47 USC 324 literally, as did the opinion

at 1926, 35 Op.Atty.Gen. 126, then this statue simply says that in addition to staying within the maximum power output limits set by FCC, each station must examine its particular circumstances to strive to use minimum power.

This interpretation does not render FCC tables of maximum allowed power a violation of 47 USC 324 as FCC claims. On the contrary, it means what FCC intended to emphasize to its licensees in its OST Bulletin No. 65, page 5-6 (see p.12). Namely, that even though maximum FCC power limits are not exceeded, still licensees are to take steps to minimize the RF power to which populations may be exposed in order for licensees to reach their broadcast areas.

A purpose of the Telecommunications Act of 1996 was to secure "higher quality services for American consumers." Minimizing the RF power to which cellular phone users and the public are exposed as provided in the FCC's previous RF guidelines is one important aspect of providing such services.

Thus, there appear two ways that 47 USC 324 is interpreted. FCC says that the statute's "minimum power" requirement is met as long as FCC's "maximum power" limits are met. With due respect, it is suggested that this FCC interpretation is far from the plain meaning and in no way can be interpreted as what Congress intended. 'Maximum allowed power' is just not the same as 'minimum power necessary' without exceeding maximum limits. Minimum power needed must be determined on a case by case basis, and cannot be set in advance, as can FCC maximum limits.

When Congress told FCC to finish its rule making in ET-Docket 93-63 [Telecom. Act of 1996, sec. 704(c)] it did not authorize FCC to exceed its authority and violate federal stat-

ute, such as 47 USC 324. Therefore, whatever RF guidelines FCC might propose, they cannot conflict with 47 USC 324 as understood according to the U.S. Attorney General view at 1926, 35 Op.Atty.Gen. 126, at p.10-11]

.

Also, as noted above, FCC did not give any documentation or specifics about its methods or results when it stated seeking a "proper balance" between the needs of public health and efficient telecommunications services was the reason it did not adopt the "as low as reasonably achievable" policy (reversing its previous policy in ANSI 1982, noted above) – and such reversal appearing in conflict with the policy of Congress as given in 47 U.S.C. 324 described above.

This court has ruled, "[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." [*Motor Vehicles Manufacturers Assn. v. State Farm Mutual, 463 U.S.* 29,42].

Whether the understanding of the FCC or the view of the Attorney General above is followed in the build-up of the wireless technology revolution can have a great impact. This can effect how this build-up occurs, what types of base station transmission facilities are developed, what types of cellular phones are designed, and how extensively the population is exposed to RF beyond what is as low as reasonably achievable.

For this reason it is very important for the Court to decide to consider hearing Question #2 above and deciding what 47 USC 324 requires.

Question #4: Whether an agency may have delegated authority to preempt state or local public health regulations on a matter when that agency does not have expertise in that matter or when expertise is otherwise lacking, or when the preemption delegation lacks a standard?

In addition to the comments already submitted on the above question, consider the following. The CPT petition, #00-0427, notes that the case J.W. Hampton, Jr. and Co. v. United States, 276 U.S. 394 was recently referenced in Mistretta v. United States, 488 U.S. 361, 371-372. In Hampton, Jr. and Co. is noted regarding preemption authority that,

"If such a power is to be exercised at all, it can be only satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject." Hampton Jr. and Co. 276 U.S. at 406 quoting State ex rel. Railroad and Warehouse Comm'n v. Chicago, M. and St. P. R. Co., 38 Minn. 281, 301, 37 N.W. 782 (1888).

Also, this Court ruled,

> "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' [In *Motor Vehicle Mfrs. Assn. v. State Farm Mutual,* 463 U.S. 29, 43 (1983) citing *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962)]

Pertaining to this standard of review, note that from the Statement of the Case for this question it is clear both EPA

and FDA acknowledge that: (1) evidence of adverse health exists below the hazard threshold upon which the FCC standard is based, (2) the FCC standard does not address the issue of chronic exposure, and (3) that these agencies do not have sufficient information to advise on what specific maximum limits should be to protect from chronic RF exposure.

Thus, based on *Motor Vehicles* above, to preempt in an area means there is sufficient knowledge about the subject to know how to decide, so important factors can be properly considered. So it seems that the only 'regulation' FCC can properly adopt when needed information is lacking to rule that local jurisdictions may set their own criteria as long as it is based upon bona fide scientific studies and public health considerations.

FCC may not argue it rules rely on the delegated authority of the federal health agencies – for there is no rational connection between FCC assertions its rules have the support of the federal health agencies and the facts in the record.

FCC justified its rules claiming these rules had the support of the federal health agencies. As noted at p.13-14, whatever support these agencies did give, they emphasized that the new FCC rules did not rely on knowledge of the long-term chronic exposure health effects of RF radiation. (see discussion above).

Moreover, it was noted at p.14-18 that perhaps two of the most important questions are:

(a) "What should be the RF exposure level in public places?"

(b) "When should manufacturers be excused from evaluating if their cellular or other hand-held phone products cause RF exposure limits to be exceed?

As shown at p.14-18, for both of these questions, FCC did not follow what it proposed to the federal health agencies in its draft. Instead of using the more stringent NCRP 17.4.3 [at p.79] 'general population limits to apply to public thoroughfares, FCC uses limits for occupational/controlled exposure that are 500% of these general population RF limits that FCC proposed to the federal health agencies to apply to public thoroughfares.

Similarly, FCC excludes from evaluation of compliance with the safety limits cellular phones (900 MHz) even though it told the federal health agencies it would defer such action regarding any type of hand-held phone. Moreover, it allows exclusion from such evaluation phones with output power up to 580 milliwatts [#72-73 at p.76-77]– which is more than 300% of what FCC said was the output power above which under worst case conditions RF exposure can exceed safety limits [#71, at p.75-76].

These two differences between what FCC proposed and what it did are not 'minor points'. Rather they are amongst the most significant points of the entire rule making. If the FCC rules are allowed to stand, then RF exposure limits will be 500% of what FCC proposed to the federal health agencies to apply to the nation's public thoroughfares (side walks, parks, beaches, bus stops, etc.) This is a major public

health issue and alone deserving of this Court reviewing whether FCC exercised proper delegated authority.

What other proposal reverses occurred between the FCC staff recommendations and what the FCC did we may never know – since FCC will not reveal the document to which agencies responded.

Therefore, FCC cannot say its guidelines have the support of the federal health agencies with delegated authority on RF health issues since neither the Court nor the public know what was in the document to which the federal health agencies responded. This Court ruled, "the agency must examine the relevant data and articulate a satisfactory explanation for its actions including a 'rational connection between the facts found and choice made.' " [Motor Vehicles Id. 43 [citations therein omitted].

Rule 10 says when a Court departs far from accepted judicial procedure, then supervision may be needed. Here the Second Circuit is not troubled that incessant FCC claims of health agency support rest on a document FCC keeps secret and admits may not reflect the final rule (p.83). Allowing this practice greatly threatens democratic process. Moreover wireless technology is sweeping the nation and the health of 100s of millions of people can be affected. These considerations justify the Court's attention. The Court need NOT decide if FCC 'flipped' on what it proposed, but only that important FCC conclusions of health agency support cannot stand when support is based on a secret document, so the rule making is unlawful. [since even FCC admits there could have been changes after the draft was seen by the health agencies [p.83]

Question 5. Whether FCC may imply "environmental effects" in 47 USC 332(c)(7)(B)(iv) includes "health effects", since PL 104-104 sec. 601 prohibits implied preemption

and sec. 253(b) provides for States protecting public safety?

In addition to the argument in petitions of Worsham and Fichtenberg, consider the following:

1. Local regulation to protect health is within the permitted by the provisions of 42 USC 332(c)(3)(A) [at p.44] regarding the "other terms and conditions" local jurisdictions can regulate. The Committee report explicitly mentions zoning authority is retained without any restrictions [p.46]. Therefore, Congress has explicitly granted authority to regulate RF radiation to protect health, and unless it later explicitly limited such authority, FCC is powerless to exceed its authority and preempt what Congress has said is off limits to FCC. Thus, while Congress certainly permitted FCC to regulate the operations of its licensees bar local jurisdictions for also doing likewise, particularly regarding zoning authority and to protect health.

2. In the same section 47 USC 332, are the different terms 'safety of life' [47 USC 332(a) at p.44] and the contested "environmental effects" in 332(c)(7)(B)(iv). Different terms mean different things. Accordingly, the preemption pertaining to 'environmental effects' does not pertain to local regulations to protect safety of life, including regulation to protect the public health from RF radiation from FCC licensed facilities.

3. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) definitions define "environment" without any reference to health (p. 37).

4. The legislative history favors preventing such FCC preemption. While HR 1555 and its Committee report strongly supports the FCC position, the Joint Conference report does not. Because:
   (a) The Senate version of the Bill did not even include a

zoning preemption section as did the House. This suggests the Senate did not accept the findings of the House of Representatives.[p.47-49, p.51]

(b) Mention in HR 1555 Committee Report of the need for "uniform, consistent requirements with adequate safeguards of the public health and safety" are completely removed from the final Joint report.

(c) The Joint version removes entirely any direction to FCC about protecting health [p.55] and refers only to 'environment.' Congress is expected to provide direction when it issues a preemption., especially to protect the public health. Accordingly, if Congress intended to preempt health, one is hard-pressed to explain why Congress would remove direction for such preemption (although arguably inadequate) from the House Committee report. Similarly, if the Joint Committee [p.53-56] intended to preempt local RF radiation public health and safety regulations it would not have removed language already in the House Committee report explaining this was intended.

5. 47 USC 253(b) [at p.40] explicitly provides for States being able to regulate to protect the "public safety and welfare" even if it may cause a 'barrier to entry.' As a separate basis for State authority the section also authorizes States to "safe guard the rights of consumers;" The Committee text chooses to explain only what such safeguarding may includes. So this was all that was thought in need of clarification. Just because it was not commented upon, it is still a valid State authorization.

6. Both previous and present FCC regulations set no compli ance requirements for staying within its RF limit guide lines – other than to submit an "Environmental Asses sment" if limits are exceeded. It is very challenging to believe that Congress intended local RF public health

compliance limits to be replaced by a the requirement merely that an operator must submit some "Environmental Assessment" when his facilities exceed FCC RF guidelines.

See par. #4 of NPRM, JA 0376 showing this FCC policy was in effect at least from 1985 and continuing in effect when the preemption statute became law. In its First Order (Report & Order) FCC acknowledges, "As was true for the previous rules, there are no specific compliance requirements as such." [Appendix A, Final Regulatory Flexibility Analysis, Sec.IV. subsection: Other compliance requirements, at p.78, JA 705]

Here FCC argues that the requirement to do an EA is a "de facto compliance requirement" in order "to avoid the preparation of a costly and time-consuming EA." But FCC provides no data for such a conclusion, and admits there is little data since "EAs are rarely filed." Indeed, FCC needs to explain why it disbelieves that the more likely scenario are computer generated reports run off a 'paper-mill' requiring almost no time or cost.

7. The 'conditional phrasing' of the syntax of the preemption statute argues against the FCC and Second Circuit interpretation.

The statute does not say that under all circumstances are local jurisdiction regulations of RF to be preempted if they are more stringent than those of the FCC. Rather, only if they are based "on the environmental effects" of RF radiation. Thus, the very syntax implies there are conditions for which local jurisdiction regulation of RF may not be preempted. What else could this be but to protect the public health?

Question #6: Whether Congress in 47 U.S.C. 332(c)(7)(B)(iv), by preempting local jurisdictions from regulating RF radiation, gave jurisdictions 'no choice' but to implement

FCC rules, or to be compelled if they refused, has de facto commandeered states or local jurisdictions to run a federal program, in violation of the 10th amendment?

In addition to the comments in submitted petitions on this question,, consider the following amplification on the comment in petition #00-407 that,

> "Since such dangers of risk to property are so obvious and there is no benefit to the community by so abandoning [regulation of personal wireless services facilities], that any jurisdiction that reverses its present course of zoning and permitting such facilities puts itself at liability risk." [at p. 36 of #00-047].

The Court has noted,

"For a court or jury, in the guise of a tort suit, to review the reasonableness of the city's judgment on these matters [policy making decisions] would be an infringement upon the powers properly vested in a coordinate co-equal branch of government. [*Owen v. City of Independence*, 445 U.S. 622, 648 (1980)] Citing *Johnson v. State*, 69 Cal. 2d 782, 794, n.8 447 P.2d 352, 361 n.8 (1968) (en banc) ("Immunity for 'discretionary' activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government.").

The Court continues,

"In order to ensure against any invasion into the legitimate sphere of the municipality's policy making process, courts have therefore refused to entertain suits against the city for "either the non-exercise of, or for the manner in which in good faith it exercises, discretionary powers of a public or legislative character." *Owen* Id. 648 and citations therein.

But one question is how "in good faith" could a local jurisdiction reverse its requiring personal wireless services facilities to be subject to zoning and permitting regulations?

The Supreme Court has stated,
"Revocation constitutes a reversal of the agency's former views as to the proper course. * * * Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." [*Motor Vehicle Mfrs. Assn. v. State Farm Mutual,* 463 U.S. 29, 42.]

While the above was applied to federal agencies, the same reasoning applies to a test of "in good faith" should a local jurisdiction abandon zoning and permitting of cellular towers and other personal wireless services facilities. What good reason could a jurisdiction give to demonstrate 'in good faith'?

Abandonment would subject the public and businesses to risk of damage to property and life and damage to the characteristics of neighborhoods. In *Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County*, 205 F.3d 688, 703 (4th Cir. 2000) Fourth Circuit Judge Niemeyer notes some of these obvious disastrous consequences.

Could the local jurisdiction claim it wanted to avoid approving facilities based on FCC guidelines? No. It makes no sense. By abandoning the field with no federal program to take its place, the City is giving its implicit approval for any cellular phone tower or other personal wireless services facility to be built any way any where.

Could the local jurisdiction claim it would let a fed-

eral program license such facilities and so let the federal program feel the brunt of public displeasure? No. Because it is the local jurisdiction that will face any liability and other consequences of such abandonment, given there is no federal zoning and permitting program. Thus the essential "in good faith" test that provides local jurisdiction immunity would fail.

Accordingly, "The innocent individual who is harmed by an abuse of government authority is assured that he will be compensated for his injury." *Owen* Id. 657. Since no rational reason could be given for a local jurisdiction to abandon the above zoning and permitting, with no suitable federal program to take its place, there are good grounds to believe that such abandonment would be considered an abuse of government authority.

In Owen, the Court also noted, "[B]y the end of the 19th century, courts regularly held that in imposing a specific duty on the municipality in its charter or by statute, the State had impliedly withdrawn city's immunity from liability for nonperformance or misperformance of its obligation." *Owen* Id. at 646 with citations therein.

If the Court will grant hearing this question, then numerous examples of State law requiring its local jurisdictions to act to protect property from damage will be cited. Since there is no rational basis a local jurisdiction could offer for abandoning cellular tower zoning and permitting when there is no federal program suitable to take its place, as noted above, local jurisdictions subject to such State requirements will be liable for damages to property due to such abandonment.

The Court also noted that under 42 USC 1983, relief from deprivation of 14th amendment rights might be brought to a federal court, that "a municipality can be li-

able under1983 only where its policies are the "moving force [behind] the constitutional violation." [*Canton v. Harris*, 489 U.S. 378, 389 (1989) (with citations therein).

The Court continued, "Only where a municipalities failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under 1983." *Canton* Id. at 389. It is blatantly obvious what the adverse impacts would by on endangering lives and property should a municipality abandon zoning and permitting of cellular phone towers when there is an absence of a suitable federal program to take its place, as Judge Niemeyer notes above. Hence, such abandonment would subject the jurisdiction to liability risk.

For the above reasons, the choice of abandonment is a choice to take on significant liability risk. This 'choice' to accept a liability risk was found in *New York v. United States*, 505 U.S. 144 (1992) to be a commandeering of state or local government and thus unconstitutional.

> "Because an instruction to state governments to take title to waste standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two." *New York* Id. at 505 U.S. 144, 176.

Since the 'choice' of abandonment results in damage and liability risk it is no real choice, and for reasons the same as New York (regulate or accept liability) the preemption is de facto commandeering of state or local government.

The above provides important characteristics of this preemption that distinguishes it from other related Supreme Court cases. For example in *Hodel v. Virginia Surface Mining & Reclamation Association,* 452 U.S. 264, the Court held there was no commandeering and valid preemption in part because "If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government." *Hodel* Id. at 288.

However, in our case, if local jurisdictions abandoned zoning and permitting of cellular phone towers and other personal wireless services facilities there is no suitable federal program to take its place.

In *Federal Energy Regulatory Commission (FERC) v. Missippi,* 456 U.S. 742, the Court did entertain the option that the choice put to the States – that of either abandoning regulation of the field altogether or considering federal standards – may be a difficult one. And that is particularly true when Congress, as is the case here, has failed to provide an alternative regulatory mechanism. " [*FERC* Id. at 766].

However, in the case of *FERC*, abandonment of a state utility regulatory authority would not lead to the chaos and risk to loss of life and property were cellular phone tower zoning abandoned. Nor would it put the state or local jurisdiction at likely liability risk. Rather, abandonment could merely affect utility rates, procedures for hearing complaints, and related utility matters and which occurred already for existing unregulated utilities.

Similarly, in *Garcia v. San Antonio*, 460 U.S. 528, if the San Antonio Metropolitan Transit Authority abandoned the field of transit services, it may likely cause

transit difficulties for the public and business. However, these difficulties would not put the authority at liability risk, as would the abandonment required to avoid regulating according to the FCC RF exposure preemption.

Therefore for the above reasons, while FCC in its brief before the Second Circuit used *Hodel, FERC* and *Garcia* to justify the constitutionality of its preemption [FCC Brief at 41-43] its reliance on these cases is misplaced. Similarly, Judge King in Petersburg Cellular gives arguments similar to those of the FCC and which are likewise misplaced. The test is not whether a local jurisdiction function is 'traditional' or not – which *Garcia* said was no longer a helpful criteria. Rather a proper test criteria is whether by abandoning a critical local jurisdiction function when there is no suitable federal program to take its place, the local jurisdiction puts itself at liability risk or otherwise must face not a difficult choice, but an 'impossible' choice.

For example, suppose the section of the Brady gun control act found unconstitutional in *Printz v. United States*, 521 U.S. 898 (1997) was crafted in an alternative form to appear as a conditional preemption, similar to the language in FERC. That is, suppose just like FERC stated that 'if there is a state utility authority' it must do certain things, suppose a hypothetical Brady gun control act said 'if a local jurisdiction has a chief law enforcement officer ("CLEO"), then the local jurisdiction must require the CLEO to do certain things. Like FERC, would the Court say, "Nothing requires the local jurisdiction to act as provided. It has the choice – although 'a difficult one' of abandoning the field of law enforcement"? Abandoning state utility regulation is a possible choice, but abandoning law enforcement is not.

The 'choice' of abandoning law enforcement would cause such chaos and loss of life and property, and put the jurisdiction at liability risks, is an impossible choice. Likely the

Court would find it so and rule that this hypothetical reformulation of the unconstitutional Brady gun control provision is de facto commandeering and still unconstitutional regardless of the guise in which it is worded.

In a similar manner the FCC preemption in this case also presents an impossible choice of abandonment. The FCC preemption that provides the forced choice of accepting liability (or other impossible choice) or regulate according to the federal program – becomes 'de facto' commandeering based on the principles in *New York* above, and is unconstitutional.

Conclusion

For the above additional reasons a writ of certiorari should be granted for the supported petitions.

Respectfully submitted,

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Appendix B

40 CFR § 302.3 Definitions.

As used in this part, all terms shall have the meaning set forth below:

The Act, CERCLA, or Superfund means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Pub. L. 96-510);

Administrator means the Administrator of the United States Environmental Protection Agency (``EPA"); Consumer product shall have the meaning stated in 15 U.S.C. 2052;

Environment means (1) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Fishery Conservation and Management Act of 1976, and (2) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient 304air within the United States or under the jurisdiction of the United States;

42 USC Sec. 1983

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken

in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

47 U.S.C. Sec. 253. Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to

require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply--

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

Senate Conference Report No. 104-230, 104th Cong. 2d Sess. 253--REMOVAL OF BARRIERS TO ENTRY

Senate bill

Section 20(a) adds a new section 254 to the Communications Act and is intended to remove all barriers to entry in the provision of telecommunications services.

Subsection (a) of new section 254 preempts any State and local statutes and regulations, or other State and local legal requirements, that may prohibit or have the effect of prohibiting any entity from providing interstate or intrastate telecommunications services.

Subsection (b) of section 254 preserves a State's authority to impose, on a competitively neutral basis and consistent with universal service provisions, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. States may not exercise this authority in a way that has the effect of imposing entry barriers or other prohibitions preempted by new section 254(a).

Subsection (c) of new section 254 provides that nothing in new section 254 affects the authority of States or local governments to manage the public rights-of-way or to require, on a competitively neutral and nondiscriminatory basis, fair and reasonable compensation for the use of public rights-of-way, on a nondiscriminatory basis, provided any compensation re-

quired is publicly disclosed.

Subsection (d) requires the Commission, after notice and an opportunity for public comment, to preempt the enforcement of any State or local statutes, regulations or legal requirements that violate or are inconsistent with the prohibition on entry barriers contained in subsections (a) or (b) of section 254.

Subsection (e) of new section 254 simply clarifies that new section 254 does not affect the application of section 332(c)(3) of the Communications Act to CMS providers.

Section 309 adds a new section 263 to the Communications Act and is intended to permit States to adopt certain statutes or regulations regarding the provision of service by competing telecommunications carriers in rural markets. Such statutes or regulations may be no more restrictive than the criteria set forth in section 309. The Commission is authorized to preempt any State statute or regulation that is inconsistent with the Commission's regulations implementing this section.

House amendment

The House provisions are identical or similar to subsections 254(a), (b) and (c). The House amendment does not have a similar provision (d) requiring the Commission to preempt State or local barriers to entry, if it makes a determination that they have been erected.

Conference agreement

The conference agreement adopts the Senate provisions.

New section 253(b) clarifies that nothing in this section shall affect the ability of a State to safeguard the rights of consumers. In addition to consumers of telecommunications services, the conferees intend that this includes the consumers of elec-

tric, gas, water or steam utilities, to the extent such utilities choose to provide telecommunications services. Existing State laws or regulations that reasonably condition telecommunications activities of a monopoly utility and are designed to protect captive utility ratepayers from the potential harms caused by such activities are not preempted under this section. However, explicit prohibitions on entry by a utility into telecommunications are preempted under this section.

The rural markets provision in section 309 of the Senate bill is simplified and moved to this section. The modification clarifies that, without violating the prohibition on barriers to entry, a State may require a competitor seeking to provide service in a rural market to meet the requirements for designation as an eligible telecommunications carrier. That is, the State may require the competitor to offer service and advertise throughout the service area served by a rural telephone company. The provision would not apply if the rural telephone company has obtained an exemption, suspension, or modification under new section 251(f) that effectively prevents a competitor from meeting the eligible telecommunications carrier requirements. In addition, the
provision would not apply to providers of CMS.

47 U.S.C. Sec. 309. Application for license

[In 1993 Pub. L. 103-66, Sec. 6002(a), added subsec. (j).]

(j) Use of competitive bidding

Subsec. (j). Pub. L. 103-66, Sec. 6002(a), added subsec. (j).

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission

shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combina-

tions or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum; and (E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed--

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.

47 USC Sec. 332. Mobile services
(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will--

(1) promote the safety of life and property;
(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;
(3) encourage competition and provide services to the largest feasible number of users; or
(4) increase interservice sharing opportunities between private mobile services and other services.

47 USC 332(c) Regulatory treatment of mobile services
(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.

Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(1) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(2) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

House Report 103-111 of 103rd Congress, 1st Sess. 261 (1993). Comments on 47 U.S.C. 332(c)(3)(A)

It is the intent of the Committee that the States still would be able to regulate the terms and conditions of the services. By, 'terms and conditions,' the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (e.g. zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under 'terms and conditions'.

B11

House Bill HR 1555. SEC. 107. FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS.

(a) National Wireless Telecommunications Siting Policy.--Section 332(c) of the Act (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

``(7) Facilities siting policies.--(A) Within 180 days after enactment of this paragraph, the Commission shall prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services.

``(B) Pursuant to subchapter III of chapter 5, title 5, United States Code, the Commission shall establish a negotiated rulemaking committee to negotiate and develop a proposed policy to comply with the requirements of this paragraph. Such committee shall include representatives from State and local governments, affected industries, and public safety agencies. In negotiating and developing such a policy, the committee shall take into account--

``(i) the desirability of enhancing the coverage and quality of commercial mobile services and fostering competition in the provision of such services;

``(ii) the legitimate interests of State and local governments in matters of exclusively local concern;

``(iii) the effect of State and local regulation of facilities siting on interstate commerce; and

``(iv) the administrative costs to State and local governments of reviewing requests for authorization to locate facilities for the provision of commercial mobile services.

``(C) The policy prescribed pursuant to this paragraph shall ensure that--

``(i) regulation of the placement, construction, and modification of facilities for the provision of commercial mobile services by any State or local government or instrumentality thereof--

``(I) is reasonable, nondiscriminatory, and limited to the

minimum necessary to accomplish the State or local government's legitimate purposes; and

``(II) does not prohibit or have the effect of precluding any commercial mobile service; and

``(ii) a State or local government or instrumentality thereof shall act on any request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile services within a reasonable period of time after the request is fully filed with such government or instrumentality; and

``(iii) any decision by a State or local government or instrumentality thereof to deny a request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile services shall be in writing and shall be supported by substantial evidence contained in a written record.

``(D) The policy prescribed pursuant to this paragraph shall provide that no State or local government or any instrumentality thereof may regulate the placement, construction, modification, or operation of such facilities on the basis of the environmental effects of radio frequency emissions, to the extent that such facilities comply with the Commission's regulations concerning such emissions.

``(E) In accordance with subchapter III of chapter 5, title 5, United States Code, the Commission shall periodically establish a negotiated rulemaking committee to review the policy prescribed by the Commission under this paragraph and to recommend revisions to such policy.".

(b) Radio Frequency Emissions.--Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

(c) Availability of Property.--Within 180 days of the enactment of this Act, the Commission shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for

the placement of new telecommunications facilities by duly licensed providers of telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission, or the current or planned use of the property, rights-of-way, and easements in question. Reasonable cost-based fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.

House Committee Report 104-204, 104th Cong. 1st. Sess. Section 107. Facilities Siting; Radio Frequency Emission Standards

Section 107 provides that within 180 days of enactment, the Commission is to prescribe a national policy for the siting of commercial mobile radio services facilities. Representatives of affected industries, State and local governments and public safety agencies are to be included in the negotiation committee. It is the Committee's intent that the Commission establish a negotiated rulemaking committee authorized by the Negotiated Rulemaking Act of 1990 (subchapter III of chapter 5, Title 5 of the U.S. Code) comprised of representatives of State and local governments, public safety agencies and affected wireless telecommunications (Commercial Mobile Radio Service)
industries. The committee is to develop a uniform national policy for the siting of Commercial Mobile Radio Service (CMRS) facilities for antennas, cell sites and other infrastructure-related equipment necessary to provide efficient wireless telecommunications services to the public.

The committee's recommendations must ensure that (1) State and local regulation is reasonable, nondiscriminatory, and the minimum necessary and does not have the effect of precluding any commercial mobile service; (2) siting requests are acted upon within a reasonable period of time; and (3) denials of requests are issued in writing and supported by substantial evidence. The siting of facilities cannot be denied on the basis of Radio Frequency (RF) emission levels which are in compliance with Commission RF emission regulated levels. The Commission is to complete within 180 days its action on RF emission standards. The Federal Government, within 180 days after enactment, is to prescribe procedures to make available to wireless telecommunications providers property and rights-of-way under its control on a fair, reasonable and nondiscriminatory basis.

The Committee finds that current State and local
requirements, siting and zoning decisions by non-federal units

of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services (PCS) as well as the rebuilding of a digital technology-based cellular telecommunications network. The Committee believes it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible. Such requirements will ensure an appropriate balance in policy and will speed deployment and the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range and options for such services.

The Committee recognizes that there are legitimate State and local concerns involved in regulating the siting of such facilities and believes the negotiated rulemaking committee should address those matters, such as aesthetic values and the costs associated with the use and maintenance of public rights-of-way. The intent of the Committee is that requirements resulting from the negotiated rulemaking committee's work and subsequent Commission rulemaking will allow construction of a CMRS network at a lower cost for siting and construction compatible with legitimate public health, safety and property protections while fully addressing the legitimate concerns of all affected parties and providing certainty for planning and building.

The Committee has received substantial evidence that local zoning decisions, while responsive to local concern about the potential effects of radio frequency emission levels, are at times not supported by scientific and medical evidence. A high quality national wireless telecommunications network cannot exist if each of its component must meet different RF standards in each community. The Committee believes the Commission rulemaking on this issue (ET Docket 93-62) should contain adequate, appropriate and necessary levels of protection to the public, and needs to be completed expeditiously. No State or local government, solely on the basis of RF emissions, should block the construction of sites and fa-

cilities or installation of equipment which comply with the Commission RF standards. The Commission is directed to develop and issue procedures to make available to the maximum extent possible the use of Federal Government property, rights-of-ways, easements and any other physical instruments and appropriate assets that could be used as CMRS facilities sites that do not conflict with the intent of other Federal laws and regulations. The Committee recognizes, for example, that use of the Washington Monument, Yellowstone National Park or a pristine wildlife sanctuary, while perhaps prime sites for an antenna and other facilities, are not appropriate and use of them would be contrary to environmental, conservation, and public safety laws.

B17

TELECOMMUNICATIONS ACT OF 1996
Senate Conference Report No. 104-230, 104th Cong. 2d Sess. 704—Facilities siting, radio frequency emission standards

Senate bill :
No provision.

House amendment

Section 108 of the House amendment required the Commission to issue regulations within 180 days of enactment for siting of CMS. A negotiated rulemaking committee comprised of State and local governments, public safety agencies and the affected industries were to have attempted to develop a uniform policy to propose to the Commission for the siting of wireless tower sites.

The House amendment also required the Commission to complete its pending Radio Frequency (RF) emission exposure standards within 180 days of enactment. The siting of facilities could not be denied on the basis of RF emission levels for facilities that were in compliance with the Commission standard.

The House amendment also required that to the greatest extent possible the Federal government make available to use of Federal property, rights-of-way, easements and any other physical instruments in the siting of wireless telecommunications facilities.

Conference agreement

The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement. The

conference agreement also provides a mechanism for judicial relief from zoning decisions that fail to comply with the provisions of this section. It is the intent of the conferees that other than under section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act and section 704 of the Telecommunications Act of 1996 the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or
modification of CMS facilities should be terminated.

When utilizing the term `functionally equivalent services' the conferees are referring only to personal wireless services as defined in this section that directly compete against one another. The intent of the conferees is to ensure that a State or local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services described in this section unreasonably favor one competitor over another. The conferees also intend that the phrase `unreasonably discriminate among providers of functionally equivalent services' will provide localities with the flexibility to treat
facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district.

Actions taken by State or local governments shall not prohibit or have the effect of prohibiting the placement, construction or modification of personal wireless services. It is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis.

Under subsection (c)(7)(B)(ii), decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision.

The phrase `substantial evidence contained in a written record' is the traditional standard used for judicial review of agency actions.

The conferees intend section 332(c)(7)(B)(iv) to prevent a State or local government or its instrumentalities from basing the regulation of the placement, construction or modification of CMS facilities directly or indirectly on the environmental effects of radio frequency emissions if those facilities comply with the Commission's regulations adopted pursuant to section 704(b) concerning such emissions.

The limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and are not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities.

The conferees intend that the court to which a party appeals a decision under section 332(c)(7)(B)(v) may be the Federal district court in which the facilities are located or a State court of competent jurisdiction, at the option of the party making the appeal, and that the courts act expeditiously in deciding such cases. The term `final action' of that new subparagraph means final administrative action at the State or local government level so that a party can commence action under

the subparagraph rather than waiting for the exhaustion of any independent State court remedy otherwise required.

With respect to the availability of Federal property for the use of wireless telecommunications infrastructure sites under section 704(c), the conferees generally adopt the House provisions, but substitute the President or his designee for the Commission.

It should be noted that the provisions relating to telecommunications facilities are not limited to commercial mobile radio licensees, but also will include other Commission licensed wireless common carriers such as point to point microwave in the extremely high frequency portion of the electromagnetic spectrum which rely on line of sight for transmitting communication services.

C1

Appendix C: Affidavits and other documents

- Alison Rall: Reports shortly after a 400 foot cellular tower was erected next to their farm that their beef herd became sickly, egg production dropped, wild fowl left the area, dairy cows had "many miscarriages, birthing problems, suckling problems, and many of them developed tumors. * * * Our five children all began experiencing frequent nosebleeds, hair loss, weight loss, and kidney problems."

- **David Fichtenberg:** "Because of our purpose, AHA (Ad Hoc Association), and I believe all of our members, want to influence local public officials so they may establish regulation of RF more stringent than those of the FCC to protect health, safety, and quality of life. * * * AHA has been harmed because it believes its members and the public it serves would likely have benefited from more stringent RF exposure limits had the studies it submitted to the FCC been evaluated.

- **Charles R. Manville:** "In June 1997 [one month after installation of a cellular tower I began to experience frequent headaches and dizziness when I was at my home on Willis Hill. * * * Until I began to experience headaches and dizziness in June, I had never experienced recurrent headaches or dizziness and had been in excellent health. * * * In September I spent a week on Penobscot Bay, Maine and my headaches went away completely. Those headaches and dizziness returned within a day of my return to Willis Hill.

Affidavits continued:

- **Janet and Dale Newton, Lorinda Knowlton, Roger H. Knowlton, D.O.** :"When I attended hearings on this subject [cellular phone tower zoning and permitting] I was informed that there could be no discussion in the record on environmental or health concerns again for fear of a court challenge by any provided that decisions were even indirectly based on health or environment concerns."

- D. Fichtenberg, supplementary affidavit:

Declaration of
David Fichtenberg
PO Box 7577
Olympia, WA 98507-7577

Pertaining to Supreme Court of the United States,
Petition for certiorari of David Fichtenberg, docket #00-0407

I, David Fichtenberg, hereby declare that I am over 21 years old and reside in King County of the State of Washington.

On June 10, 1998, I submitted an affidavit pertaining to Court of Appeals for the Second Circuit consolidated cases 97-4328(L), 98-4003 (Con.), 98-4005 (Con.), 98-4025(Con.), 98-4122(Con.). Since then, significant changes of which I am aware are: (1) parties who were Ad Hoc Association members and whose interest Ad-Hoc Association had sought to represent in the Second Circuit proceeding above have since chosen to have their interests and representation furthered through the law firm of Landy & Seymour. They have had a Petition for Writ of Certiorari filed in their behalf (Citizens for Appropriate Telecommunications Facilities et al. ("Citizens"), docket #00-00393) by counsel of record Whitney North Seymour, Jr. of the firm of Landy & Seymour. Among these are persons whose names also appear in

my June 10, 1998 affidavit are Dorothy Miller, Holly Fournier, and Libby Kelly. Please see the Citizens petition for a complete list of the names of these parties. (2) Also a motion to the Second Circuit in the above proceeding there was filed August 27, 1998 to correct my June 10, 1998 affidavit by clarifying that Cellular Phone Taskforce was not a member of Ad-Hoc Association.

I remain President of Ad-Hoc Association. Some of our members who participated in the proceeding below are Alan Golden, Virginia J. Moore-Ward, Rainer Waldman Atkins, Michael C. Worsham, Bill Jenkins, and Faye Mueller-Hebert. My principal duties are to carry out the Ad-Hoc Association mission is described in my June 10, 1998 affidavit, at pages 11-15 of my above petition for writ of certiorari, and at pages 2-6 of the principal brief in which Ad-Hoc Association and I joined in the Second Circuit proceeding. I am being harmed in carrying out my duties for Ad-Hoc Association in the manner as described in these referenced pages for Ad-Hoc Association to further its mission.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on: October 4, 2000

Signed: /s/ David Fichtenberg

_____

David Fichtenberg

Notice that all parties to proceeding below, except CPT Joined in same brief and reply

October 7, 1998

Carolyn Clark Campbell, Clerk
U.S. Court of Appeals for the Second Circuit
United States Court House, 40 Foley Square
New York, New York 10007

Re: Cellular Phone Taskforce, No. 97-4328, and consolidated cases

Attention: Michael Adragna

Dear Ms. Campbell:

Petitioners in the referenced cases filed initial briefs May 22, 1998 and reply briefs July 27, 1998. Two of the Petitioners, Ad-Hoc Association et al. and CWA filed jointly. The second set of briefs came from a single party, Cellular Phone Taskforce.

As you know, the caption of the case recites the names of a number of other individuals and associations who are participating in the appeals. Originally, they were co-petitioners, with Ad-Hoc Association, in Nos. 98-4003 or 98-4025 filed respectively in the D.C. and Ninth Circuits.

The purpose of this letter is to clarify that these individuals and associations are also joined – through common representation with Ad-Hoc Association – in the initial and reply briefs submitted by Ad-Hoc Association and CWA. Specifically, all the captioned parties except Cellular Phone Taskforce are joined in the briefs submitted by Ad-Hoc Association and CWA/CWA Local 7810.

We appreciate the Court's indulgence in permitting this clari-

fication. Please direct any questions to the undersigned.

Sincerely,

/s/ James R. Hobson
James R. Hobson
Counsel for Ad-Hoc Association et al.

c.c. Michael Adragna; all parties of record

C6 (62)

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of RAINER VALLEY ASSOCIATION FOR SAFE WIRELESS TECHNOLOGY	Hearing Examiner File No. MUP-96-038 DCLU File No. 9603542 ORDER OF DISMISSAL

This matter involves property located at 4213 South Orcas Street. Under application 9603542, the applicant (the Walter Group) proposed construction on the property of a minor communication utility consisting of 12 panel type antennae. On October 10, 1996, DCLU published notice of its decision, in which it recommended that the required Council Conditional Use be granted, and in which it entered a Determination of Non-Significance (DNS). The effect of a DNS is to relieve the applicant of the need to prepare an Environmental Impact Statement (EIS).

On October 24, 1996 David Fichtenberg filed an appeal on behalf of the Rainier Valley Association for Safe Wireless Technology, challenging the failure of DCLU to require an EIS. That appeal was based on the possible environmental impacts of the radiofrequency radiation that would be associated with the proposed facility.

On October 31, 1996, the applicant (the Walter Group) filed a motion with the Hearing Examiner seeking dismissal of the

appellant's SEPA appeal. In this motion, the applicant argued that the federal government had preempted the ability of State or local government to regulate wireless service facilities on the basis of the environmental effects of radio frequency emissions.

A response to the applicant's motion was filed by the appellant on November 12, 1996. In that response, the appellant contested whether the federal government had, indeed, preempted local control over questions of radio frequency emissions. The appellant also argued that even if there was preemption, an EIS should still be prepared.

As to the first issue, the Telecommunications Act of 1996 added the following paragraph (iv) to 47 USC sec. 332(c):

> "No State or local government or instrumentality thereof may regulate the placement, construction or modification of personal wireless services facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communication] Commission's regulations concerning such emissions."

In August of 1996, the FCC issued its "Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation [ET Docket 93-62 (FCC 96-326)]. That order adopted Maximum Permitted Exposure (MPE) standards.

The proposed facility complies with the FCC's MPE standards. Accordingly, the City of Seattle is preempted from regulating the proposed minor communications utility on the basis of the environmental impacts of its radio frequency emissions.

The second issued then is whether, in the face of this preemption, the Hearing Examiner retains the ability to require an EIS in this case. The answer to that question is "no."

SMC 25.05.340(A) provides that a DNS is appropriate when the responsible official determines that "there will be no probable sufficient environmental impacts from a proposal . . . . SMC 25.05.4000 sets forth the purpose of an EIS; Paragraph B provides that an EIS "shall inform decision makers and the public of reasonable alternatives, including mitigation measures, that would avoid or minimize adverse impacts or enhance environmental quality."

The appellant's appeal is based entirely on the possible environmental effects of RF radiation. Therefore, to reverse the Department in this case, the Examiner would have to determine that environmental impacts of RF radiation, the very thing over which the City has no jurisdiction, creates a "probable significant impact." Moreover, because the City is preempted from regulating the proposed facility on the basis of the environmental effects of RF radiation, any EIS prepared to explore those impacts could not be used to regulate or mitigate whatever adverse impacts there were revealed. This would be an absurd result.

This is not to suggest that the construction of a minor communications utility could never require the preparation of an EIS. Such a requirement could still be appropriate when other impacts from protected City viewpoints, etc. were at issue. However, such concerns were not raised by this appeal.

On the basis of the above, this appeal from the Determination of Non-significance entered by DCLU in this case should be, and hereby is, DISMISSED. The pubic hearing on November 26, 1996 will be limited to testimony and evidence regarding the proposal's compliance with the requirements for a council conditional use.

Entered this 14th day of November, 1996.

/s/ Guy E. Fletcher
Guy E. Fletcher, Deputy Hearing Examiner

Office of Hearing Examiner
Room 1320 Alaska Building
618 Second Avenue
Seattle, WA 98104
(206) 684-0521
(2 0 6) 6 8 5 - 0 5 3 6 (F A X)

C10 (66)

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of SEATTLITES FOR APPRORIATE ANTENNAS IN OUR NEIGHBORHOODS (SAANE)	Hearing Examiner File No. W-99-010
from a Determination of Nonsignificance (DNS) by the Director of the Department of Design, Construction, and Land Use	ORDER ON MOTION TO DISMISS

The Department has moved to dismiss certain issues from the above-referenced appeal. Both the Department and the appellant have submitted written information regarding the motion, and the motion was discussed at the prehearing conference on this matter. The appeal issues are identified in the appellant's appeal letter dated November 3, 1999. At the conference, appellant and the Department agreed that the issue pertaining to failure to provide notice of the DNS should be dismissed.

Many of the other issues raised by the appellant's appeal letter are not properly the subject of a SEPA appeal in this case, for they relate to matters that are not changed by the ordinance. The appellant has argued that the failure to amend the ordinance (in particular, the radio frequency (RF) standards) in certain ways will have an impact.

* * *

Entered this 6th day of December, 1999

/s/ Anne Watanabe
Anne Watanabe, Deputy Hearing Examiner
Room 1320 Alaska Building
618 Second Avenue
Seattle, WA 98104-2222
(206) 684-0521
FAX: (206) 684-0536

C12

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of SEATTLITES FOR APPRORIATE ANTENNAS IN OUR NEIGHBORHOODS (SAANE)	Hearing Examiner File No. W-99-010

from a Determination of Nonsignificance (DNS) by the Director of the Department of Design, Construction, and Land Use

The Director issued as Determination of Non-Significance (DNS) regarding a proposal to amend Title 23 and Title 25 of the Seattle Municipal Code. The appellant exercised the right to appeal pursuant to SMC 25.05.680.

The appeal hearing was held on December 13, 1999, before the undersigned Deputy Hearing Examiner (Examiner). Parties represented at the proceeding were: the appellant, SAANE et al, by David Fichtenberg; and, the Director, Department of Design, Construction, and Land Use (DCLU by Bernard J. Glynn Jr., Assistant City Attorney.

* * *

The Determination of Nonsignificance issued by the Director is hereby AFFIRMED.

Entered this 5th day of January, 2000.

/s/ Anne Watanabe
Anne Watanabe
Deputy Hearing Examiner

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

[FCC]
[SEAL]

Office of
The Chairman

Federal Communications Commission
Office of the Secretary

July 1, 1996

The Honorable Carol M. Browner
Administrator
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Carol:

I am writing to follow-up on our phone conversation of several weeks ago regarding radiofrequency (RF) emissions and Commission's efforts to update and amend the guidelines we use for evaluating human exposure to environmental RF energy emitted by FCC-regulated transmitters. This is one of the more important issues we are wrestling with, and I believe it is critical that we do all we can to protect the public and workers from any potential health effects from the radio services we license.

As you know, in 1993, the FCC released a Notice of Proposed Rule Making (NPRM; ET Docket 93-62) seeking public comment on these issues. At that time we requested that EPA and other federal agencies with responsibilities for health and safety comment on the various issues raised in the NPRM including our proposal to adopt the guidelines developed by the Institute of Electrical and Electronics Engineers.

Inc., (IEEE), and later endorsed by the American National Standards Institute (ANSI), designated ANSI/IEEE C95. 1-1992. In response, we received comments from the EPA as well as the Food and Drug Administration (FDA), the Occupational Safety and Health Administration (OSHA), and the National Institute for Occupational Safety and Health (NIOSH).

The federal health and safety agencies generally expressed support for our efforts to update our RF exposure guidelines. However, comments from our sister agencies included recommendations for alternatives to our original proposal to adopt the ANSI/IEEE guidelines. For example, the EPA recommended that we consider adopting certain features of the ANSI/IEEE guidelines along with others recommended by the National Council on Radiation Protection and Measurements (NCRP). In many ways the ANSI/IEEE and NCRP guidelines are similar. However, as pointed out by the EPA, there are certain significant differences. For example, the EPA expressed its opinion that at microwave frequencies the limits specified by NCRP would be preferable. Likewise, NIOSH believed that it would be more appropriate to use the MPE limits recommended by NCRP, but did support the adoption of the ANSI/IEEE limits on induced RF currents. The FDA generally supported our adoption of the ANSI/IEEE standard, but expressed significant concern about the radiated power exclusion clause included in the standard. Similarly, the Occupational Safety and Health Administration (OSHA) generally supported the ANSI/IEEE standard, but objected to the way it defined the use of two different exposure tiers to protect the public and workers, respectively.

W e accord great weight to the views of our sister health and safety agencies who have primary responsibility in these areas. Therefore, in developing the new guidelines, FCC staff is considering an approach that, we believe, accommodates all the comments we received and responds to the recommendations made by the EPA and by the other federal health and

safety agencies. Generally, this approach incorporates elements from both ANSI/IEEE and NCRP, and includes: 1) adoption of limits for field strength and power density limits based on NCRP recommendations (the ANSVIBBE and NCRP limits are similar up to 1500 MHz, above which NCRP has different MPE limits); 2) adoption of ANSI/IEEE limits for localized specific absorption rate (SAR) (again, similaT to NCRP); 3) deferring adoption of the ANSI/IEEE radiated power exclusion clause pending possible future consideration of a modified version; 4) a categorical exclusion policy for certain transmitters: and 5) endorsement of measurement procedures described in ANSI/IEEE C95.3 and NCRP Report No. 119.

Upon completion of your review of this approach, we seek your written comments concerning whether this approach is consistent with your views and adequately addresses your concerns. We will place your letter in the record of the role-making docket.

Under the Telecommunications Act of 1996 the Commission is required to complete action in this proceeding by early August. Therefore, we would appreciate your early consideration of this request. If you or your staff have any questions please contact me at (202) 418-1000 or Dr. Robert Cleveland, of our Office of Engineering and Technology, at (202) 418-2422.

I look forward to your timely response.

Sincerely,

/s/ Read E. Hunt
Read E. Hunt
Chairman

C16

(72)

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

[FCC]
[SEAL]

Federal Communications Commission
Office of the Secretary

July 2, 1996

D. Bruce Burlington, M.D.
Director
Center for Devices and Radiological Health
U.S. Food and Drug Administration
Mail Code HFZ-1
5600 Fishers Lane
Rockville, MD 20857

Dear Dr. Burlington:

In 1993, the FCC released a Notice of Proposed Rule Making (NPRM ET Docket 93-62) to update and amend the guidelines we use for evaluating human exposure to environmental RF energy emitted by FCC-regulated transmitters. At that time we requested that the Food and Drug Administration and other federal agencies with responsibilities for health and safety comment on the various issues raised in the NPRM including our proposal to adopt the guidelines developed by the Institute of Electrical and Electronics Engineers. Inc., (IEEE), and later endorsed by the American National Standards Institute (ANSI), designated ANSI/IEEE C95. 1-1992. In response, we received comments from the FDA as well as from other agencies.

The federal health and safety agencies generally expressed support for our efforts to update our RF exposure

guidelines. However, comments from our sister agencies included recommendations for alternatives to our original proposal to adopt the ANSI/IEEE guidelines. For example, the U.S. Environmental Protection Agency recommended that we consider adopting certain features of the ANSI/IEEE guidelines along with others recommended by the National Council on Radiation Protection and Measurements (NCRP). In many ways the ANSI/IEEE and NCRP guidelines are similar. However, as pointed out by the EPA, there are certain significant differences. For example, the EPA expressed its opinion that at microwave frequencies the limits specified by NCRP would be preferable. Likewise, the National Institute of Occupational Safety and Health (NIOSH) believed that it would be more appropriate to use the MPE limits recommended by NCRP, but did support the adoption of the ANSI/IEEE limits on induced RF currents. The Occupational Safety and Health Administration (OSHA) generally supported the ANSI/IEEE standard, but objected to the way it defined the use of two different exposure tiers to protect the public and workers, respectively. The FDA generally supported our adoption of the ANSI/IEEE standard, but expressed significant concern about the radiated power exclusion clause included in the standard.

W e accord great weight to the views of our sister health and safety agencies who have primary responsibility in these areas. Therefore, in developing the new guidelines, FCC staff is considering an approach that, we believe, accommodates all the comments we received and responds to the recommendations made by the FDA and by the other federal health and safety agencies. Genera1ly, this approach incorporates elements from both ANSI/IEEE and NCRP, and includes: 1) adoption of limits for field strength and power density limits based on NCRP recommendations (the ANSVIBBE and NCRP limits are similar up to 1500 MHz, above which NCRP has different MPE limits); 2) adoption of ANSI/IEEE limits for localized specific absorption rate (SAR) (again, simi1aT to NCRP); 3) deferring adoption of

the ANSI/IEEE radiated power exclusion clause pending possible future consideration of a modified version; 4) a categorical exclusion policy for certain transmitters: and 5) endorsement of measurement procedures described in ANSI/ IEEE C95.3 and NCRP Report No. 119.

Upon completion of your review of this approach, we seek your written comments concerning whether this approach is consistent with your views and adequately addresses your concerns. We will place your letter in the record of the role-making docket.

Under the Telecommunications Act of 1996 the Commission is required to complete action in this proceeding by early August. Therefore, we would appreciate your early consideration of this request. If you or your staff have any questions please contact me at (202) 418-1000 or Dr. Robert Cleveland, of our Office of Engineering and Technology, at (202) 418-2422.

I look forward to your timely response.

Sincerely,

/s/ Richard M. Smith
Richard M. Smith
Chief
Office of Engineering and Technology

Excerpts from Notice FCC 96-326, Report & Order in ET-Docket 93-62, and reported at 11 F.C.C. Rcd. 15123 (1996)

43. Accordingly, "occupational/controlled" exposure, as used by the Commission, will apply to situations in which persons are exposed as a consequence of their employment and in which those persons who are exposed have been made fully aware of the potential for exposure and can exercise control over the their exposure. Occupational/controlled exposure will also apply where exposure is of a transient nature as a result of incidental passage through a location where exposure levels may be above general population/uncontrolled limits (see below), as long as the exposed person has been made fully aware of the potential for exposure and can exercise control over his or her exposure by leaving the area or by some other appropriate means. We will apply the occupational/controlled exposure limits to amateur radio operators and members of their immediate household, as discussed later (see para. 162, infra).

47 CFR 1.1310 NOTE 1 TO TABLE 1: Occupational/ controlled limits apply in situations in which persons are exposed as a consequence of their employment provided those persons are fully aware of the potential for exposure and can exercise control over their exposure. Limits for occupational/ controlled exposure also apply in situations when an individual is transient through a location where occupational/ controlled limits apply provided he or she is made aware of the potential for exposure.

71. Based on the concerns expressed by the FDA, we are not adopting at this time low-power device exclusions based on radiated power, as contained in the 1992 ANSI/ IEEE guidelines. As discussed above, the FDA cites recent studies indicating that cellular telephones and other hand-held transmitters that meet ANSI/IEEE radiated power exclusion limits can exceed the corresponding exclusion limits for SAR. In one of those studies, the highest SAR values were

measured when the antennas and cases of various hand-held cellular telephones were placed in direct contact with a head model, i.e. less than 2.5 cm from the head. Of six telephone models tested in this study under these "worst case" conditions, the highest SAR obtained was approximately 8.8 mW/gram (8.8 W/kg) for 1 watt of output power. This SAR exceeds the recommended limit of 1.6 W/kg for an uncontrolled environment, suggesting that an appropriate radiated power exclusion level for ensuring that the 1.6 W/kg SAR limit could not be exceeded under "worst case" conditions would be on the order of 180 mW at 900 MHz. The ANSI/IEEE low-power device exclusion clause allows for exclusions at a power level of 700 mW at 900 MHz provided a separation of 2.5 cm is maintained between the radiating structure of the device and the body of the user, although, as discussed earlier, comments submitted in this proceeding maintain that the 2.5 cm distance was not meant to apply to the head.

72. This study also reported SAR values measured when the telephones were positioned normally against the head model (i.e., less than 2.5 cm from the head), but with the antenna at various angles and distances from the head. This was referred to as "standard" handling of the telephone. For this "standard" operating situation, the highest SAR measured from the six models tested was approximately 2.8 W/kg for 1 watt of power. This implies that, for the "standard" exposure condition, an appropriate "worst case" radiated power level to meet the 1.6 W/kg SAR limit at 900 MHz should be on the order of about 570 mW, not 700 mW as recommended by the 1992 ANSI/IEEE standard. Similarly, recent data submitted to our laboratory analyzing SAR values for hand-held PCS devices operating near 2 GHz shows that at 125 mW of average power maximum, SAR values (averaged over 1 gram) can, in some cases, be up to 80-90% of the 1.6 W/kg limit. The 1992 ANSI/IEEE radiated power exclusion clause applies only to frequencies up to 1500 MHz. However, if this exclusion were extrapolated to PCS frequencies (1850-1990 MHz), the radiated power exclusion limit would be in the

range of 300-350 mW, more than twice the 125 mW used by the devices tested. Therefore, it would appear that some devices that would qualify for the radiated power exclusion in the 1992 ANSI/IEEE standard might exceed the SAR limit of 1.6 W/kg.

73. As noted by the FDA, these studies raise questions about the accuracy of the low-power device exclusions based on radiated power as contained in the 1992 ANSI/IEEE guidelines. We acknowledge, however, that all of the transmitters in the devices in these studies were placed directly against the head and did not maintain the 2.5 cm separation distance required by ANSI. However, as discussed above, it is unclear whether that separation distance was meant to apply to the head. In light of these outstanding issues and questions, we do not feel that, at this time, it is appropriate for us to adopt the low power exclusion. On the other hand, we also recognize that to require SAR evaluation of every low-power transmitting device subject to Commission authorization would prove to be a costly and unnecessary burden for many manufacturers. Therefore, at this time we will require only routine SAR evaluation for the devices noted above that constitute the classes for which there appears to be the greatest potential for exposure because of their relatively higher duty factors. Based on additional scientific evidence that may be forthcoming, we may consider modifying or expanding this requirement, and we may also consider whether a modified exclusion clause based on radiated power can be adopted.

Notice FCC 96-326, Appendix A: Final Regulatory Flexibility Analysis

4. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements:

Other Compliance Requirements

As was true for the previous rules, there are no specific compliance requirements, as such. Under the Commis-

sion's NEPA rules, applicants and licensees are required to submit an Environmental Assessment (EA) if they do not comply with our RF exposure guidelines (47 CFR § 1.1311). An EA is a detailed accounting of the consequences created by a specific action that may have a significant environmental impact, in this case a Commission authorization of a transmitter or facility that exceeds the RF guidelines. An EA would be evaluated by the Commission to determine whether the authorization should be granted in view of the environmental impact. In reality, this leads to a de facto compliance requirement, since most applicants and licensees who are not categorically excluded (see above) undertake measures to ensure compliance before submitting an application in order to avoid the preparation of a costly and time-consuming EA. For this reason EAs are rarely filed with the Commission. This has not changed from the existing rules.

National Radiation Protection and Measurement (NCRP) Report 86: Biological Effects and Exposure Criteria For Radiofrequency Electromagnetic Fields.
Sec. 17.4.3 Time Averaging for the General Population

The time base by which to average the limiting *SAR* for occupational exposure is 0.1 h (6 minutes). For exposure of the general population an averaging period of 0.5 h (30 min) is recommended. The increased stringency of the general-population limit allows this liberalization with no significant additional risk because the population limit, along with the 30-min time-averaging period, restricts the maximal *SA* to the population during the 30-min period to a value of no larger than that experienced during the 6-min time-averaging period of occupational exposure. Overall, the SA for the population remains at one-fifth that of the occupational value. At the same time, the 30-min time-averaging period is responsive to some special circumstances for the public at large. Examples are transient passage by the individual past high-powered RFEM sources, and brief exposure to civil telecommunications systems. [emphasis added]

c24

(80)

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

[FCC]
[SEAL]

MAR 20, 1998

Mr. Arthur Firstenberg
P.O. Box 684
Norwich, N.Y. 434-4499

This is in response to your request of March 9, 1998 pursuant to the Freedom of Information Act (the "FOIA"), 5 U.S.C. Sec 552. You request a copy of the draft Report & Order, dated July 2, 1996 in ET Docket No. 93-62 that was coordinated with the Interdepartment Radio Advisory Committee (the "IRAC").

As your letter notes, I recently denied a request for the identical document filed by Mr. James Hobson. You attached a copy of my denial to your request. As I stated in my denial to Mr. Hobson, the draft Report & Order is a predecisional document which is exempt from disclosure pursuant to Exemption 5 of the FOIA, 5 U.S.C. Sec.(b)(5) and Sec.0.457(e) of the Commission's Rules, 47 C.F.R. Sec. 0.457(e). For the reasons set forth in my letter to Mr. Hobson, a copy of which is appended hereto, I am hereby denying your above-referenced request. You may file an application for review of any part of this decision with the Commission's Office of General Counsel within 30 days in accordance with 47 C.F. R. Sec. 0.461(i).

Sincerely;

/s/ Richard M. Smith
Chief
Office of Engineering & Technology

Enclosure

C25

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

[FCC]
[SEAL]

MAR 20, 1998

James R. Hobson, Esq.
Donelan, Cleary, Wood & Maser, P.C.
1100 New York Ave – Suite 750
Washington, D.C. 20005

Dear Mr. Hobson,

This is in response to your request of February 11, 1998 pursuant to the Freedom of Information Act (the "FOIA"), 5 U. S.C. Sec. 552. You request copies of the draft Report & Order, dated July 2, 1996 in ET Docket 93-62 that was coordinated with the Interdepartment Radio Advisory Committee (the "IRAC") as well as any transmittal letter or Memorandum from the FCC to IRAC member agencies that summarizes or explains the contents of the draft Report & Order.

The draft Report & Order is a predecisional document which is exempt from disclosure pursuant to Exemption 5 of the FOIA, 5 U.S.C. Sec.(b)(5) and Sec. 0.457(e) of the Commission's Rules, 47 C.F.R. Sec. 0.457(e). It was clearly part of the deliberative process of the agency in that it represents the recommendation of the Office of Engineering & Technology made in consultation with other Commission Bureaus and Offices, to the FCC Commissioners.

Release of the draft document would threaten "the give and take of the deliberative process" see Chemical Manufacturers Ass'n v. Consumer Prod. Safety Comm. 600 F.Supp. 114, 118(D.D.C 1984). The deliberative process aspect of Exemption 5 is rooted in three distinct policy purposes: (1) to en-

courage frank discussion within Government; (2) to prevent public confusion that could result from the disclosure of the internal debate prior to the formulation of agency policies; and (3) to guarantee that the Government will be judged on positions actually adopted rather than on factors considered in reaching such positions. Jordan v. Dep't of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc). The concerns underlying Exemption 5 are directly applicable to the instant case.

Nor does the fact that the draft Report & Order was circulated to the IRAC alter the privileged nature of the document. The draft Report & Order was circulated to the IRAC as part of the normal IRAC review process applicable to decisions which could have an impact on other federal agencies. It was apparently submitted to the IRAC without any cover letter or other transmittal memorandum. All comments received were, if written, placed in the docket of the proceeding and, if oral, were summarized, and summaries thereof were placed in the docket file.

Exemption 5 and Sec. 0.457(e) clearly protect interagency documents as well as intra-agency documents. Indeed, it would undermine the purpose behind the exemption if a document which would, in absence of disclosure to other agencies pursuant to the IRAC process, be a privileged intra-agency document, were to lose its privilege merely because the IRAC process required it to be circulated to other Federal agencies. Disclosure of the document in question would reveal aspects of the Commission's as well as of the Government's deliberative process by providing a meaningful glimpse into the thoughts of agency personnel involved in the creation thereof. Thus, the document falls within the Exemption 5 of the FOIA.

Your letter states that documents which would ordinarily be privileged pursuant to Exemption 5 "lose the protection if an agency, in the making of a final decision, chooses expressly to adopt them or incorporate them by reference." The docu-

ment in question is a draft document; neither it nor the final version of the Report & Order reflect any information not contained in the public record. The Report & Order that was eventually adopted may differ in some respects from the document in question because it incorporated comments received from the Commissioners as well as staff of this agency and the staffs of some of the other agencies which received the draft pursuant to the IRAC consultative process. It does not adopt or incorporate by reference any documents received from those agencies. Consequently, I do not believe the line of cases you cite in this regard is apposit.

For the aforementioned reasons, I am hereby denying your above request. You may file an application for review of any part of this initial decision which you find unsatisfactory with the Commission's Office of General Counsel within 30 days in accordance with 47 C.F.R. Sec. 0.46(I).

Sincerely,

/s/ Richard M. Smith
Richard M. Smith
Chief
Office of Engineering & Technology

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Footnote #1 from Notice FCC 96-326, Report & Order in ET-Docket 93-62, and reported at 11 F.C.C. Rcd. 15123 (1996).

Specifically, we are adopting limits for field strength and power density that are generally based on Sections 17.4.1 and 17.4.2, and the time-averaging provisions recommended in Sections 17.4.1.1 and 17.4.3, of "Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields," NCRP Report No. 86 (1986), National Council on Radiation Protection and Measurements (NCRP). With the exception of the limits on exposure to power density above 1500 MHz and the limits for exposure to lower frequency magnetic fields, these MPE limits are also generally based on the guidelines contained in the RF safety standard developed by the Institute of Electrical and Electronic Engineers, Inc. (IEEE) and adopted by the American National Standards Institute (ANSI). See Section 4.1 of ANSI/IEEE C95.1-1992, "Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz".

Supreme Court, U.S.
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Nos. 00-393, 00-407, 00-417 and 00-427

In the Supreme Court of the United States

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, ET. AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

DAVID FICHTENBERG, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

MICHAEL WORSHAM, PETITIONER

v.

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CELLULAR PHONE TASKFORCE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 47 U.S.C. 332(c)(7)(B)(iv) (Supp. IV 1998), which preempts state and local zoning authorities from regulating the "environmental effects" of personal wireless telecommunications facilities, includes preemption of state and local regulation of the human health effects of such facilities.

2. Whether the preemptive effect of 47 U.S.C. 332(c)(7)(B)(iv) (Supp. IV 1998) violates the Tenth Amendment.

3. Whether the court of appeals correctly found that the Federal Communications Commission was not required to prepare an Environmental Impact Statement pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, when it promulgated rules implementing the provisions of that Act.

4. Whether Congress's delegation of authority to the FCC to promulgate rules governing the environmental effects of radiofrequency radiation violated the "nondelegation" doctrine.

5. Whether the court of appeals correctly found that the FCC was not required to solicit the comments of other agencies on record material newly submitted to the FCC during a reconsideration of its initial order promulgating rules governing the environmental effects of radiofrequency radiation.

6. Whether the court of appeals correctly held that the FCC's rules governing the environmental effects of radiofrequency radiation did not violate the Rehabilitation Act of 1973, 29 U.S.C. 794.

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In the Supreme Court of the United States

No. 00-393

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 00-407

DAVID FICHTENBERG, PETITIONER

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A22[1]) is reported at 205 F.3d 82.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2000. Petitions for rehearing were denied on June 6, 2000 (Pet. App. A23-A25) and June 15, 2000 (Pet. App. A26-A27). The petition for a writ of certiorari in No. 00-393 was filed on September 8, 2000. The petitions in Nos. 00-407, 00-417 and 00-427 were filed on September 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA), requires that in connection with "major Federal actions significantly affecting the quality of the human environment," federal agencies prepare an "environmental impact" statement (EIS) that assesses the environmental effects of a proposed project. 42 U.S.C. 4332(2)(C). Not all activities, however, are "major" actions requiring such an analysis. Under rules established by the Council on Environmental Quality (CEQ), the agency that administers NEPA, some projects require only an "environmental assessment" (EA), which may be followed by a "finding of no significant impact" (FONSI). 40 C.F.R. 1508.9, 1508.13. Other actions may be "categorically excluded" from environmental analysis. 40 C.F.R. 1508.4. Determining which level of environmental scrutiny to apply to specific categories of activities is largely left to the

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[1] Citations to "Pet. App." refer to the appendix to the petition in No. 00-393.

individual agencies. An agency must, however, define three "classes of action": those that "normally do require environmental impact statements," those that "normally do not require" any environmental evaluation, and those that "normally require environmental assessments but not necessarily environmental impact statements." 40 C.F.R. 1507.3(b)(2).

2. a. All types of wireless communications, including television, radio, cellular telephones, pagers, and similar devices, work by sending and receiving electromagnetic signals. The energy fields generated by the transmitters of radio signals, referred to as radiofrequency or RF radiation, can affect the environment. Specifically, high levels of RF energy can cause the heating of human tissue, known as a "thermal" effect.[2] In 1985, the Federal Communications Commission (FCC) implemented, pursuant to NEPA and directives issued by the CEQ, rules that specified the emission levels above which human exposure to RF energy caused by FCC-licensed transmitters would require environmental analysis under NEPA. *Biological Effects of Radiofrequency Radiation*, 100 F.C.C. 2d 543 (1985).

The exposure limits were based on RF safety standards that had been adopted in 1982 by the American

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[2] Microwave ovens work by virtue of the thermal effect of extremely high levels of RF energy. See Office of Engineering and Technology, FCC, *Questions and Answers About Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields*, OET Bulletin 56, at 6 (4th ed. 1999). The FCC exposure limit for the general public is one-fiftieth of the point at which RF energy begins to cause any unhealthful thermal effect. See National Council on Radiation Protection and Measurements, *Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields*, NCRP Report No. 86, at 279-283 (1986) (reprinted at C.A. App. 305-307).

National Standards Institute (ANSI), a recognized standard-setting organization. 100 F.C.C. 2d at 551. ANSI established recommended levels of "maximum permissible exposure" or "MPE" for various radio frequencies, since various frequencies cause a thermal effect at different rates. Transmitting facilities that would not lead to human exposure above the limits were considered to have no adverse effect and required no environmental evaluation; preparation of an EA or an EIS was required for transmitters that could cause human exposure above the limits. *Id.* at 561.

In 1992, ANSI issued new RF exposure standards. At about the same time, other organizations such as the congressionally chartered National Council on Radiation Protection and Measurements (NCRP) also issued RF protection standards. The following year, the FCC began a rulemaking proceeding to determine whether it should adopt one of the new standards to replace the 1982 ANSI standards. *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Notice of Proposed Rule Making*, 8 F.C.C.R. 2849 (1993) (*RF Notice*).

In the course of the rulemaking proceeding, the Commission received more than one hundred comments representing a broad range of interests. The Commission's staff also consulted with and/or received comments from a number of federal agencies that are responsible for the environment, human health and worker safety: the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), the Food and Drug Administration (FDA), and the National Institute for Occupational Safety and Health (NIOSH). *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Report and Order*, 11 F.C.C.R.

15,123, 15,129-15,131 (1996) (*RF Order*). When it made its ultimate decision, the FCC gave particular deference to the views of those agencies, which are "expert agencies with respect to determining appropriate levels of safe exposure to RF energy." *Id.* at 15,135. In accordance with the suggestions of the federal environmental and health agencies, the Commission ultimately adopted new guidelines based primarily on the RF exposure limits suggested by the NCRP. *Ibid.*

Under the new RF safety rules, as under the old ones, licensees generally must determine whether their transmitters will cause human exposure above the MPE limits. If so, an EA, and possibly an EIS, must be prepared and the Commission will then determine whether to allow transmission to occur.[3] No further environmental analysis is required for transmitters that will not lead to exposures greater than the limits. 47 C.F.R. 1.1307(b). Certain RF transmitters that operate at low power levels or in inaccessible locations and are thus extremely unlikely to cause exposure above the limits are categorically excluded from having to perform the initial assessment of RF exposure. 47 C.F.R. 1.1307(b); see also 40 C.F.R. 1507.3(b) (allowing agencies to create categorical exclusions). On petitions for reconsideration, the Commission reaffirmed the fundamentals of its initial decision. *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Second Memorandum Opinion and Order*, 12 F.C.C.R. 13,494 (1997) (*RF Reconsideration Order*).

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[3] As a practical matter, the FCC's experience is that licensees almost always ensure that their facilities will not cause excess exposure, and environmental analysis is rarely conducted.

b. Shortly before the Commission issued the *RF Order*, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, became law. Section 704(a) of that Act, entitled "National Wireless Telecommunications Siting Policy," added a new provision to the Communications Act of 1934, 47 U.S.C. 332(c)(7)(B)(iv),[4] which provides in pertinent part that "[n]o State or local government * * * may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." *Ibid.* In Section 704(b) of the Telecommunications Act Congress also directed that "[w]ithin 180 days * * * the Commission shall complete action in [the RF radiation rulemaking] to prescribe and make effective rules regarding the environmental effects of radio frequency emissions."[5]

The House Commerce Committee, which drafted the preemption provision, explained that the reason for the prohibition was that "siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of" advanced telecommunications services. H.R. Rep. No. 204, 104th Cong., 1st Sess. 94-95 (1995). The Committee explained that "local zoning decisions, while responsive

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[4] All citations in this brief to 47 U.S.C. 332(c)(7) refer to Supp. IV 1998.

[5] Congress also directed, in a provision not challenged by petitioners in this Court, that state and local zoning authorities act within a "reasonable period of time" after the filing of a request to build a communications tower and that denials of such requests "be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. 332(c)(7)(B)(ii) and (iii).

to local concern about the potential effects of radio frequency emission levels, are at times not supported by scientific and medical evidence." *Ibid.* In the *RF Order*, the Commission implemented the preemption provisions by adding Section 1.1307(e) to its rules, the language of which tracks the statute. 47 C.F.R. 1.1307(e).

c. In February 1997, the Cellular Telephone Taskforce submitted to the Commission a "complaint" claiming that the RF rules discriminate against persons who are hypersensitive to electromagnetic fields and thereby violate the Rehabilitation Act of 1973, 29 U.S.C. 794 (1994 & Supp. IV 1998). The Chief of the Office of Engineering and Technology, acting under delegated authority, ultimately dismissed the complaint because it addressed the activities of FCC licensees, not those of the agency itself. Letter from Richard M. Smith, Chief, OET, to Arthur Firstenberg, President, Cellular Phone Taskforce (Feb. 2, 1998) (C.A. App. 6119-6121). The FCC's rules implementing the Rehabilitation Act expressly do not apply to the "programs or activities of entities that are licensed or certified by the Commission." 47 C.F.R. 1.1830(b)(6).

3. a. The court of appeals affirmed the the Commission's orders. Pet. App. A1-A22. The court rejected the claim that the Commission had failed to take into account whether RF energy had deleterious nonthermal effects, finding that there was "room for disagreement * * * among experts in the field" regarding whether such effects existed and that "the FCC was justified in continuing to rely on the ANSI and NCRP standards." *Id.* at A10. The court held that the FCC had committed no error by not supplying the EPA and other agencies with publicly available studies that had been submitted to the FCC during the recon-

sideration proceeding. The FCC "could reasonably expect those agencies to keep abreast of scientific developments" and to "monitor all relevant scientific input" into the FCC's decision. *Ibid.*

The court rejected the claim that the FCC had violated NEPA because it did not prepare an EIS in connection with the rules. "[W]here an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient." Pet. App. A17 (quoting *Environmental Defense Fund* v. *EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973)). The court found that the FCC's orders "functionally satisf[ied] the CEQ's requirements for an EA and a FONSI." Pet. App. A17-A18.

The Court upheld the Commission's finding that, although 47 U.S.C. 332(c)(7)(B)(iv) precluded state and local governments from regulating the "placement, construction, and modification" of personal wireless service facilities "on the basis of the environmental effects of radio frequency emissions," that provision applied also to the operation of such facilities. The court noted that under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), deference must be accorded to the FCC's interpretation of the statute. Pet. App. A20. The court also noted that the savings provision of subsection (A) of the same statute provided only that the FCC may not "limit or affect the authority of a State or local government" over "the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A). Since "[s]ubsection (A) does not * * * preserve [state and local governments'] authority to regulate such facilities'

operations * * * the absence of the word 'operation' from the subsequent limitation on their authority under subsection (B)(iv) does not grant such power." Pet. App. A20.

The court rejected the claim that the preemption provision violates the Tenth Amendment. "The statute does not commandeer local authorities to administer a federal program," the court found, because "State and local governments are not required to approve or prohibit anything. The only onus placed on state and local governments * * * is that they may not regulate personal wireless service facilities that conform to the FCC Guidelines on the basis of environmental effects of RF radiation." Pet. App. A21. Straightforward preemption of that sort, the court found, does not violate the Tenth Amendment.

b. In its initial opinion, the court dismissed claims raised under the Rehabilitation Act and the Americans with Disabilities Act of 1990, 42 U.S.C. 1201 *et seq.* (ADA). Similar claims made before the agency had been resolved by the staff rather than the Commission itself, the court found, and therefore had not been the subject of a final, appealable agency order. Pet. App. A6. Pursuant to a petition for rehearing, the panel decided to address the merits of the claims notwithstanding their lack of finality. The ADA claim failed, the court found, because the relevant part of the ADA does not apply to the federal government. *Id.* at A25. The claim under the Rehabilitation Act lacks merit because that Act applies only to "the discriminatory denial of the benefits of a [federal] 'program or activity,'" and the construction of RF transmitters is not a program or activity of the FCC. *Ibid.*

ARGUMENT

Four parties, Citizens for the Appropriate Placement of Telecommunications Facilities (CAPTF), Cellular Phone Taskforce (CPT), Michael C. Worsham (Worsham) and David Fichtenberg (Fichtenberg), petition for a writ of certiorari. None of the petitions raises any issue that warrants this Court's review.

1. Petitioners Worsham and Fichtenberg claim that the Second Circuit has impermissibly interpreted 47 U.S.C. 332(c)(7)(B)(iv). That statute preempts state and local zoning authorities from regulating the "environmental effects" of personal wireless service facilities as long as the transmitter complies with the FCC's RF exposure standards. Petitioners contend (Worsham Pet. 10-14; Fichtenberg Pet. 32-35) that the court of appeals erroneously interpreted the term "environmental effects" to mean "human health effects." That claim is incorrect.

At the outset, the court below did not address the issue. The court stated in passing (Pet. App. A5) in the background section of its opinion that the preemption provision included human health considerations, but the court did not consider the question in its legal discussion and did not provide any analysis of it. For that reason alone, this case is unsuited for further review.

Moreover, the court of appeals' apparent understanding of the statute was correct and not in conflict with any decision of this Court or another court of appeals. When it enacted Section 332(c)(7)(B)(iv), Congress was clearly concerned with the biological effects of RF energy fields. The statute preempts only "to the extent that such facilities comply with the Commission's regulations concerning [RF] emissions." A tandem provision, Section 704(b) of the Telecom-

munications Act, gave the FCC 180 days to "complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." Both the rulemaking proceeding and the FCC regulations to which Congress referred concerned almost exclusively the biological effects of RF energy. The original 1982 ANSI exposure standards that the FCC adopted in 1985 were based on the absorption of RF energy by the human body and the thermal effects in the human body of various levels of RF exposure. The 1992 ANSI standard, which the Commission proposed to adopt in ET Docket 93-62, see *RF Notice*, *supra*, likewise had to do entirely with human biological effects of RF fields. The statutory preemption of state and local consideration of environmental effects of RF to the degree that a transmitter complied with the FCC's rules thus necessarily was intended to include state and local consideration of biological effects.[6]

Petitioners mistakenly rely on a general presumption that ambiguous statutes should not be interpreted to preempt state law concerning health and safety. Worsham Pet. 9; Fichtenberg Pet. 33-34. That presumption does not apply where, as here, Congress's intent to preempt local consideration of biological effects is "clearly indicated by those considerations which are persuasive of the statutory purpose." *Maurer* v. *Hamilton*, 309 U.S. 598, 614 (1940). That

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[6] The House Report discussing Section 704 of the Telecommunications Act further confirms that conclusion. The Report expressed Congress's concern that state and local authorities had interfered with the nationwide deployment of wireless communications systems for reasons that were "at times not supported by scientific *and medical* evidence." H.R. Rep. No. 204, *supra*, at 95 (emphasis added).

standard is amply satisfied by the statutory and administrative context of Section 332(c)(7)(B)(iv) as well as its legislative history. That Congress may have distinguished health effects from environmental effects (Worsham Pet. 13-14) in other statutes addressing different problems is of no moment in the face of Congress's evident intent here.

As petitioner Worsham notes, "[t]wo federal courts have essentially agreed with the Court of Appeals in the instant case." Pet. 12 (citing *AT&T Wireless PCS, Inc.* v. *City Council of Va. Beach*, 155 F.3d 423, 431 n.6 (4th Cir. 1988), and *Primeco Personal Communications* v. *Village of Fox Lake*, 35 F. Supp. 2d 643, 645 (N.D. Ill. 1999)). Petitioner Worsham asserts (Pet. 10), however, that the decision of the court of appeals "is arguably inconsistent with" the decision of the Second Circuit in *Freeman* v. *Burlington Broadcasters, Inc.*, 204 F.3d 311, cert. denied, 121 S. Ct. 276 (2000). The cited passage from *Freeman* states that the term "environmental effects" is not defined in the statute and that it "focus[es] on degradation of the natural environment, effects on historical landmarks, *and the biological effects of RF radiation*." *Id.* at 325 (emphasis added). Accordingly, *Freeman* is entirely consistent with the Second Circuit's holding in this case that the term "environmental effects" includes human health considerations. In any event, further review would not be warranted to resolve an intra-circuit discrepancy.

2. Petitioners CAPTF and Fichtenberg contend (CAPTF Pet. 14-21; Fichtenberg Pet. 35-38) that the preemptive effect of 47 U.S.C. 332(c)(7)(B)(iv) violates the Tenth Amendment. They claim that Congress has impermissibly commandeered the government apparatus of the states. The court of appeals correctly

rejected that claim, and its decision does not conflict with that of any other court of appeals or of this Court.[7]

Congress commandeers the legislative process of States "by directly compelling them to enact and enforce a federal regulatory program." *New York* v. *United States*, 505 U.S. 144, 161 (1992). In *New York*, the Court struck down Congress's requirement that the States either regulate radioactive waste under federal guidelines or take title to and dispose of the waste themselves. *Id.* at 174-175. Having no choice other than one of the two courses set forth by Congress, the States were thus pressed involuntarily into "the service of federal regulatory purposes." *Id.* at 175. Likewise, in *Printz* v. *United States*, 521 U.S. 898 (1997), the Court invalidated a federal statute that required local law enforcement officials to conduct background checks

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[7] There is a question whether petitioners have standing to present their claim. It is our position that individuals not acting in their official capacity generally lack standing to raise a Tenth Amendment claim, since they cannot establish that any personal injury would be redressed by a favorable decision, and the rights they advance in the litigation are rights of third parties. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Warth* v. *Seldin*, 422 U.S. 490 (1975); but cf. *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 700-703 (7th Cir. 1999) (discussing authorities and finding standing to raise Tenth Amendment claim), cert. denied, 120 S. Ct. 934 (2000). In the court of appeals, some individuals identified as state or local government officials were among the parties. See CAPTF Pet. ii-iii. Two of them (Holly A. Fournier and Jeannine Karlsson, see CAPTF Pet. ii) are listed as petitioners before this Court, although it is not clear whether they are acting in their official capacities and whether they are asserting in this litigation rights they hold by virtue of their official capacities. In addition, individual members of a collective governmental body ordinarily do not have standing to assert the rights of the body as a whole. See *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986).

of gun purchasers. That requirement, the Court held, "compel[led] the States to enact or administer a federal regulatory program." *Id.* at 933 (quoting *New York* v. *United States*, 505 U.S. at 188).

Section 332(c)(7)(B)(iv) does not commandeer the processes of state and local zoning authorities because it does not compel those bodies to do anything at all. Rather, the statute simply limits the factors state and local zoning authorities may consider in the exercise of their ordinary zoning functions. Those authorities may not deny a permit "on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." 47 U.S.C. 332(c)(7)(B)(iv). They are permitted to grant or deny permits on any other basis. Indeed, Congress expressly provided that with the exception of RF and a few other matters not before the Court, "nothing * * * shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A). That proviso leaves intact all other traditional bases for land use decisions, such as aesthetics or neighborhood character, or other local zoning laws. Local authorities throughout the country have successfully rejected tower siting proposals on such grounds. See, *e.g.*, *Sprint Spectrum, L.P.* v. *Willoth*, 176 F.3d 630 (2d Cir. 1999); *Aegerter* v. *City of Delafield*, 174 F.3d 886 (7th Cir. 1999); *AT&T Wireless PCS, Inc.* v. *Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307 (4th Cir. 1999); *AT&T* v. *City Council of Va. Beach*, *supra*.

This case thus falls squarely within the principle that federal law may "displace state regulation" even though

this serves to "curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981). Indeed, this Court "long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers." *Id.* at 291; see also *Testa* v. *Katt*, 330 U.S. 386 (1947). The court below thus properly held (Pet. App. A21) that "State and local governments are not required to approve or prohibit anything" and correctly rejected petitioners' Tenth Amendment claims.

Petitioner CAPTF contends (Pet. 16) that the decision below conflicts with the decision of the Fourth Circuit in *Petersburg Cellular Partnership* v. *Board of Supervisors*, 205 F.3d 688 (2000) (per curiam). In that case, the Fourth Circuit upheld a county's decision to permit a communications tower to be built, but there was no agreement on a single rationale. Only a single judge, Judge Niemeyer, would have upheld the county's decision on the ground that certain federal limitations on the county's decision violated the Tenth Amendment. See *id.* at 691; *id.* at 696-705 (opinion of Niemeyer, J.).[8] Accordingly, the Fourth Circuit did not take a position regarding the Tenth Amendment issue

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[8] The other judge voting to uphold the county's decision based his determination on the ground that the county's decision did not violate any provision of the Telecommunications Act. 205 F.3d at 706-710 (opinion of Widener, J.). The third judge dissented from the court's disposition, on the ground that the county's decision did violate a provision of the Act and that that provision did not violate the Tenth Amendment. *Id.* at 710-720 (opinion of King, J.).

in that case, and the Fourth Circuit's decision in that case therefore does not conflict with the decision of the Second Circuit here.[9]

Also without merit is the claim of CAPTF (Pet. 21) that the decision below conflicts with *Alden* v. *Maine*, 527 U.S. 706 (1999), because, in petitioner's view (Pet. 22), the federal government has allegedly "defaulted on its obligation to protect public health," and it therefore "may not simultaneously *prevent the States from taking action to do so*." The proposition on which petitioner relies—that federal courts must analyze whether a federal law adequately protects the public health before permitting it to preempt state law—has nothing to do with the Court's decision in *Alden*, which addressed Congress's power to authorize lawsuits against a State in its own courts under federal law.[10] In any event, the court below correctly found that the FCC's RF exposure standards, which were formulated by expert scientific groups that reviewed exhaustive studies and were supported by every federal health and safety

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[9] In any event, even the position urged by Judge Niemeyer in his concurring opinion in *Petersburg Cellular* does not conflict with the decision of the court below in this case. Judge Niemeyer's opinion expressed his belief that 47 U.S.C. 332(c)(7)(B)(iii), which requires a state or local decision regarding the placement of cellular towers to be "in writing and supported by substantial evidence contained in a written record," 47 U.S.C. 332(c)(7)(B)(iii), violates the Tenth Amendment. He appears to have accepted that the provision at issue here—47 U.S.C. 332(c)(7)(B)(iv)—is constitutional. 205 F.3d at 703-704.

[10] Insofar as petitioner's real claim has to do with Congress's spending priorities, see CAPTF Pet. 24-28, petitioner has no standing to air generalized grievances about those priorities. See *Schlesinger* v. *Reservists Comm. To Stop the War*, 418 U.S. 208 (1974).

agency, provide adequate protection to the public. Pet. App. A9.

3. The court of appeals found that the FCC was not required to prepare an environmental impact statement because the rulemaking process, which extensively considered the environmental effects of RF energy, amounted to "functional compliance" with NEPA; the rulemaking was, the court held, equivalent to an EA and a FONSI. Pet. App. A17-A18. Petitioner Cellular Phone Taskforce contends (Pet. 9-12) that the decision conflicts with decisions of other courts holding that the functional compliance test may lawfully be applied only to actions of the EPA and not to the actions of other federal agencies.

Petitioner's claim is incorrect. No federal regulation, statute, or other source of law prohibits the application of the functional compliance test to agencies other than EPA. The cases cited by petitioner either declined to apply the test to a particular agency or stated in dictum that the test applied only to EPA. None of them held that the test could not be applied in any circumstances to any other agency. There is thus no conflict.

As a matter of policy, the Executive Branch believes that the functional compliance test should not be applied to agencies other than EPA, and the government therefore does not ordinarily argue that environmental analyses conducted by agencies other than EPA functionally comply with NEPA. Because that policy has not been expressed in any formal manner, such as regulation or other publication, the Second Circuit did not commit legal error when it found that the FCC had functionally complied with NEPA. Moreover, in light of the extensive scientific analysis performed by the standard-setting organizations that crafted the FCC's guidelines (as well as the commentary received by the

FCC from pertinent federal agencies, including EPA), the finding below that the FCC had functionally complied with NEPA was supported by the record. Further review of the court of appeals' application in this case of the "functional compliance" test is accordingly not warranted.

In any event, the Second Circuit's judgment was correct for a reason other than the one on which it relied. The court's reasoning on this point implicitly assumes that some kind of environmental analysis was required. We argued before the court of appeals, however, that an agency's promulgation of rules that themselves implement NEPA and determine when an EIS is required, is not subject to the preparation of an EIS. The Seventh Circuit adopted that position in *Heartwood, Inc.* v. *United States Forest Service*, 230 F.3d 947 (2000).

As CEQ has interpreted and implemented NEPA, each federal agency specifies which of its actions will be subject to environmental analysis. 40 C.F.R.1507.3. Under the CEQ's approach, which is "entitled to substantial deference," *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979), an agency's regulations to determine when to prepare an EIS are not themselves subject to the EIS requirement. Rather, such rules are "more like an implementing procedure than a federal action of the type contemplated in 42 U.S.C. § 4332(2)(C)," and the categories specified by the rules "are not proposed actions, [but] categories of actions for which an EA or EIS has been deemed unnecessary." *Heartwood*, 230 F.3d at 953. The rules do not "authoriz[e] any activity or commi[t] any resources to a project that might impact the environment." *Id.* at 954. Accordingly, rules such as the FCC's rules in this case implementing

NEPA are not subject to the requirement that what might be termed a "meta-EIS" must be prepared.

4. Petitioners Worsham, Cellular Phone Taskforce and Fichtenberg contend that Congress impermissibly delegated to the FCC the authority to promulgate the RF exposure rules. Worsham Pet. 14-16; CPT Pet. 18-22; Fichtenberg Pet. 31-32. They claim that Congress articulated no "intelligible principle" to guide the FCC's determination of the issue. The court below did not address that issue, and on that ground further review is therefore not warranted.

In any event, the FCC's authority to promulgate the RF regulations does not violate the Constitution. Congress may delegate its legislative functions to agencies "under broad general directives." *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). In delegating its authority, Congress must only "lay down * * * an intelligible principle to which the [agency] is directed to conform" in order for the delegation to be constitutional. *Ibid.* (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928)).

Petitioners claim that the only congressional delegation of authority to the FCC to craft the RF rules is contained in Section 704(b) of the Telecommunications Act, which states that "[w]ithin 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." That delegation, they assert, provides constitutionally insufficient guidance.

Petitioners' argument rests on a fundamentally mistaken premise. Section 704 was not the source of the FCC's authority to act in this case, but is instead simply a congressional requirement that the FCC timely resolve an ongoing rulemaking. Indeed, the FCC first

implemented RF rules in 1985, and it began the rulemaking under review three years before the passage of the Telecommunications Act. The agency thus acted under its broad authority to regulate communications conveyed by the Communications Act of 1934.

The FCC issues licenses to use the electromagnetic spectrum pursuant to 47 U.S.C. 307(a), which accords the agency authority to grant licenses "if public convenience, interest, or necessity will be served thereby." Accord 47 U.S.C. 309(a). The public interest standard continues to be the touchstone of FCC regulation. In connection with its licensing function, Congress has granted the FCC the power to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions" of the Communications Act. 47 U.S.C. 303(r); accord 47 U.S.C. 154(i); 47 U.S.C. 303(f) (1994 & Supp. IV 1998). The Commission also has direct authority to "determine the power which each station shall use," 47 U.S.C. 303(c) and to "[r]egulate the kind of apparatus to be used with respect to its external effects," 47 U.S.C. 303(e). This Court long ago held Congress's expansive delegation of authority to the agency to be constitutional. *National Broad. Co.* v. *United States*, 319 U.S. 190, 225-226 (1943). The Court ruled that the "public interest" standard was "as concrete as the complicated factors for judgment in such a field of delegated authority permit." *Id.* at 216 (quoting *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940)). Those cases foreclose petitioners' delegation argument.[11]

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[11] Petitioners CPT and Worsham appear to claim (CPT Pet. 20-21; Worsham Pet. 16) that the decision below conflicts with *American Trucking Ass'ns, Inc.* v. *EPA*, 175 F.3d 1027 (D.C. Cir. 1999),

Petitioner Worsham further asserts (Pet. 14-15) that it violated the delegation doctrine to give the FCC authority to establish standards in a health and safety field in which the agency acknowledged it lacked expertise. That argument is mistaken.

The RF exposure rules govern the activities of entities that are licensed and heavily regulated by the FCC. Congress has charged the FCC with "mak[ing] available * * * a rapid, efficient, Nation-wide, and world-wide wire and radio communications service," 47 U.S.C. 151 (1994 & Supp. IV 1998), has declared it "the policy of the United States to encourage the provision of new technologies and services to the public," 47 U.S.C. 157(a), and has established procedures to ensure the "efficient and intensive use of the electromagnetic spectrum," 47 U.S.C. 309(j)(3)(D) (Supp. IV 1998). There is a trade-off between those goals and public exposure to RF energy: all risk from RF energy could be eliminated by prohibiting wireless communications technologies. Congress has entrusted to the FCC the process of striking the appropriate balance, a subject squarely within the agency's expertise.

To be sure, the Commission stated that it "does not have the expertise to make independent judgments on such alleged health effects as 'electrosensitivity' or other reported effects on human health. This is the responsibility of the federal health and safety agencies."

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cert. granted, 120 S. Ct. 2003 (No. 99-1257) and 120 S. Ct. 2193 (No. 99-1426). Those cases involve a substantially different regulatory scheme than does this case, and the resolution of those cases is unlikely to affect the settled analysis of the Communications Act delegation of authority to the FCC, as directly upheld by this Court in cases such as *National Broadcasting Co.* and *Pottsville Broadcasting Co.*

RF Reconsideration Order, 12 F.C.C.R. at 13,538. As the agency acknowledged when it first implemented RF exposure rules, it lacks expertise to "*develop* our own radiation exposure guidelines," but "does have the expertise and authority to *recognize* technically sound standards promulgated by reputable and competent organizations such as ANSI." 100 F.C.C. 2d at 551. Moreover, the FCC consulted extensively with EPA, FDA, OSHA and other federal health and safety agencies, all of which concurred in the final standard. *RF Order*, 11 F.C.C.R. at 15,129-15,131; *RF Reconsideration Order*, 12 F.C.C.R. at 13,538. EPA in particular had been working on its own set of RF exposure rules and it had extensive familiarity with the scientific and medical literature. Pet. App. A10. In short, the RF regulations culminated from a multi-disciplinary, multi-agency effort in which the FCC took the lead. There was no constitutional infirmity in that process.

5. Petitioner Cellular Phone Taskforce claims (Pet. 12-15) that the court below erred in finding that the FCC did not violate the Administrative Procedure Act. CPT argues that during the reconsideration proceeding the FCC was required to solicit the comments of the health and safety agencies on new record material concerning "non-thermal" effects. The court of appeals properly rejected that claim of error.

By the time of its first order, the FCC had already consulted extensively with all of the federal health and safety agencies; the discussions included possible non-thermal effects of RF energy. See Pet. App. A7-A16. Moreover, ANSI and NCRP had reviewed extensive scientific literature on non-thermal effects and found such phenomena not to be supported by the evidence. *Id.* at A9. As the FCC found, no further consultation

was needed: "we have considered carefully well over 150 sets of comments filed in this proceeding and have already consulted extensively with all of the relevant health and safety agencies." *RF Reconsideration Order*, 12 F.C.C.R. at 13,506. As found in an analogous context, "[i]t is not enough that the [new] information may be worthy of further inquiry or may be considered important research. [The question is] whether or not the new information presents a seriously different picture" than that originally envisioned. *Wisconsin* v. *Weinberger*, 745 F.2d 412, 420 (7th Cir. 1984). The court of appeals correctly concluded that "it was reasonable for the FCC to continue to rely on the ANSI and NCRP standards absent new evidence indicating that the fundamental scientific understanding underlying the ANSI and NCRP standards was no longer valid." Pet. App. A9-A10.[12]

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[12] Petitioner CPT claims (Pet. 15) that it was arbitrary for the FCC to have "eschewed serious health-agency evaluation * * * while simultaneously disclaiming its own expertise." The court below found that the FCC "could reasonably expect [the health and safety] agencies to keep abreast of scientific developments" and "expect the agency with primacy in evaluating environmental impacts to monitor all relevant scientific input into the FCC's reconsideration." Pet. App. A10. Petitioner does not challenge that finding. Indeed, in a letter which we provided to the court of appeals pursuant to Federal Rule of Appellate Procedure 28(j), EPA recently informed the agency that "[t]he information base on non-thermal effects has not changed significantly since the EPA's original comments in 1993 and 1996. * * * The majority of currently available studies suggests * * * that there are no significant non-thermal human health hazards. It therefore continues to be EPA's view that the FCC exposure guidelines adequately protect the public from all scientifically established harms that may result from RF energy fields generated by FCC licensees." Letter from Robert Brenner, Acting Deputy Assistant

Petitioner Fichtenberg raises the additional administrative law claim that the FCC without explanation switched from an earlier RF exposure standard that required exposure to be "as low as reasonably achievable" (ALARA) to the current standards. Fichtenberg Pet. 28-31. Contrary to petitioner's assertion (Pet. 28), ALARA was never the standard; rather petitioner urged that the agency make it the standard.[13] The FCC explained that a very low standard would not strike a proper "balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible." *RF Reconsideration Order*, 12 F.C.C.R. at 13,496. The court below affirmed that finding (Pet. App. A11-A12), and there is no cause to question that conclusion.

6. Finally, petitioner CPT's claim (Pet. 23-25) that the court of appeals improperly rejected its claim under the Rehabilitation Act lacks merit. The argument is that the decision below conflicts with decisions of other courts of appeals that local zoning is a "program or activity" of the relevant governmental unit.

The Rehabilitation Act of 1973, 29 U.S.C. 794 (1994 & Supp. IV 1998), bars discrimination against or denial of benefits to an "otherwise qualified individual with a disability" on the basis of the handicap "under any

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Administrator for Air and Radiation to Dale Hatfield, Chief, FCC Office of Engineering and Technology (Apr. 30, 1999).

[13] The requirement of 47 U.S.C. 324 that transmitters "use the minimum amount of power necessary to carry out the communication desired" pertains to interference between stations, not potential health effects of RF fields, which were unknown in 1934 when Section 324 was enacted.

program or activity conducted by any Executive agency." Petitioner claimed below that the proliferation of transmitters was causing discrimination against persons especially sensitive to RF fields. The court of appeals held that "CPT does not allege that electrically sensitive people are being denied the benefit of, or are subject to discrimination under, any 'program or activity' of the FCC," and it dismissed the charge. Pet. App. A25.

That holding was correct. The FCC's regulations implementing the Rehabilitation Act expressly state that the rules do not apply to the "programs or activities of entities that are licensed or certified by the Commission." 47 C.F.R. 1.1830(b)(6). Both this Court and the D.C. Circuit have affirmed that approach. *Community Television of S. Cal.* v. *Gottfried*, 459 U.S. 498 (1983); *California Ass'n of the Physically Handicapped, Inc.* v. *FCC*, 840 F.2d 88 (D.C. Cir. 1988).

That reasoning defeats petitioner's contention that the Second Circuit's judgment conflicts with the decision of the Ninth Circuit in *Bay Area Addiction Research & Treatment, Inc.* v. *City of Antioch*, 179 F.3d 725 (1999). That case applied the Rehabilitation Act to the zoning activities of a governmental unit. The FCC does not engage in zoning activities, and Congress's preemption of certain aspects of local zoning decisions does not render the FCC a zoning administrator. There is no conflict between the decision under review and that of the Ninth Circuit.[14]

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[14] Petitioner CPT also raises (Pet. 24-25) a number of procedural complaints about the FCC's alleged failure properly to address petitioner's Rehabilitation Act claims. Those complaints are effectively moot in light of the Second Circuit's decision on rehearing to address petitioner's arguments on the merits and its ruling on

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2000

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the merits that the FCC's orders in this case did not violate the Rehabilitation Act. See Pet. App. A25.

No. 00-407 (4)

In The
Supreme Court of the United States

David S. Fichtenberg, pro se
Petitioner,

v.

Federal Communications Commisison
And United States of America,
Respondents.

On Petition For Writ Of Certiorari to
The United States Court of Appeals
For The Second Circuit

Reply of Petitioner to Brief in Opposition

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19 pp

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BRIEF OF PETITIONER DAVID FICHTENBERG (DF), PRO SE, IN REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION

A. Introductory Statement

Petitioner is keenly aware of the beneficial economic and personal opportunities that wireless technology is bringing now and in the coming decades to our nation. Yet, with these benefits comes a growing concern of the public about adverse health effects from the radio frequency (RF) radiation from this technology [DF Petition (Pet.) 27].

Respondents' silence about such concerns should not suggest public confidence in the RF rules of the Federal Communications Commission ("FCC"). Indeed, public concern is evidenced by coverage in national magazines: "Is Your Cell Really Safe?", Newsweek, Aug. 7, 2000, p. 63; Worrying About Wireless," Scientific American, September 2000, p. 20-21; "Do Cell Phones Need Warnings?", Time, October 9, 2000, p.66-67, and on television programs: ABC 20/20 reporting on "Wireless Worries," on October 20, 1999 and May 26, 2000; ABC News, May 11, 2000 on "Cell Phone Risk for Kids?"; CNN TV, August 9, 2000, Larry King Live on "Do Cellular Phones Cause Cancer?"

This Court's review is needed in order to promote public safety and the confidence the public, business community, and state and local governments need to be assured the challenged regulations and rule making process were scrutinized and any legal defects corrected, considering,

> "close scrutiny of administrative action is particularly appropriate when the interests at stake are not merely economic interests in a license or rate structure, but personal interests in life and health" [*Welford v. Ruckelshaus*, 439 F. 2d. 598, 607 (D.C. Cir. 1971)]

B. Reply to Respondents' Assertions of Fact

Respondents' Assertions that federal health agencies' concurred with FCC's rule is undermined by the record

Respondents' National Environmental Policy Act (NEPA), Adm. Procedures Act (APA), and non-delegation of authority arguments depend on assuming the federal health agencies: Environmental Protection Agency (EPA),

Food and Drug Adm.(FDA), National Institutes of Occupational Safety and Health(NIOSH), and the Occupational Safety and Health Adm.(OSHA) "concurred in the final [FCC RF] standard." [*RF Order*, 1996 Notice FCC 96-326, 11 F.C.C. Rcd. 15129-151313; RF Reconsideration Order, 12 F.C.C. Rec. at 13538. 1997 Notice FCC 97-303], Respondents Brief (Resp. Br.22) Yet, the record shows evidence these agencies did not concur (pages lodged at the Court are shown herein by prefix 'L').

1. The FCC refuses to reveal what the federal health agencies agreed to

In July 1996, the federal health agencies responded to a draft document prior to publication of the final rule. [L74-L76; Bill Jenkins' Brief in Support (BJ Br.) p.80-83; Cellular Phone Taskforce (CPT) Reply brief at the Court of Appeals (CPT CA Reply) p. 25-26, B45-B47. The absence of this draft document from the record and the FCC's refusal to reveal it, even under a Freedom of Information Act request [BJ Br. 80-83, L74-L76] belies FCC claiming the agencies concurred. Indeed, there is evidence that they did not agree with significant aspects of the final rule. FCC itself stated:

> "The Report and Order that was adopted may *differ* in some respects from the [draft] document because it incorporated comments received from the Commissioners as well as staff of this agency and the staffs of some of the other agencies .... "(emphasis added) BJ Br. 83; L76.

Indeed, comments in the record suggest that the agencies did *not* concur in important respects with the final rule.

2. EPA and NIOSH objected to relaxed exposure standards in public thoroughfares

The FCC's standard allows 500% of the EPA's and NIOSH's recommended exposure limits "where exposure is of a transient nature." These places include residential sidewalks, parks, and bus stops. RF Order, par.# 43; BJ Br. at 14-18, 25-26; EPA comments of Nov. 10, 1993 at court below Joint Appendix (JA) 443, L33; NIOSH Jan. 10, 1994, JA 491-92, L47-L48; court below Ad-Hoc Assoc. et al. main brief that DF joined (AHA CA Br.) at 28, n.33.

3. EPA, FDA, and NIOSH do not agree with the FCC's assertion its standard also applies to long-term, chronic, non-thermal exposure conditions

EPA, FDA, and NIOSH told the FCC that the 1992 ANSI and the 1986 NCRP RF radiation guidelines the FCC was relying on do not apply to long-term, chronic exposure to low level (non-thermal) RF radiation. [ANSI is the American National Standards Institute; NCRP is the National Council of Radiation Protection and Measurements]. Both in 1993 and 1996, the FDA told the FCC that the 1992 ANSI standard does not address the issue of long-term, chronic exposures to RF fields. JA 451, L41, JA 616, L79.

EPA scientist Norbert Hankin wrote in 1996 that "Both the NCRP and ANSI/IEEE standards are thermally based, and *do not apply to chronic, nonthermal exposure situations*. (emphasis added) JA 1042 (L95).

Similarly, Respondents' asserted that "ANSI and NCRP had reviewed *extensive* scientific literature on non-thermal effects and found such phenomena not to be supported by the evidence." Resp. Br. 22. Yet, ANSI reported a "*paucity* of reliable data on chronic [non-thermal] exposures." (emphasis added) [ANSI 1992, p.27, lodged with the Court, and JA 357]; NCRP stated "the Western reports are largely based on acute studies of laboratory animals exposed at relatively high levels of irradiation." NCRP p. 169, JA 295.12.

4. EPA reported that the data bases of ANSI and NCRP needed updating, FDA and OSHA agreed

(a) Respondents' assert EPA "had extensive familiarity with the scientific and medical literature."

Resp. Br. 22. Yet, EPA's own letter of Nov. 9, 1993 states, "The FCC should consider requesting the NCRP to revise its 1986 report to provide an updated, comprehensive review [of RF effects] and recommendations for exposure limits." JA 439, L29. Also, EPA told the FCC the standards EPA was developing in 1995 were "interim" standards only designed to protect against "heat/temperature related effects", not against non-thermal or modulation effects. JA 565-567, L55-L57. Respondents' reliance on EPA's monitoring the chronic, non-thermal RF effects literature is misplaced. Even though FDA (JA 450, L40) and OSHA (JA 522, L49) also indicated to the FCC that the standards upon which it relied

were out-of-date, still the FCC concluded, "represent the best scientific thought." *RF Order*, par.#168

(b) EPA indicated to FCC again in 1999 that EPA's database was old. EPA said "[t]he information base [of EPA] on non-thermal effects has not changed significantly since the EPA's original comments in 1993 . . " [R. Brenner EPA Acting Dep. Ass. Adm.for Air and Radiation, April 30, 1999, Resp. Br. 23, n.12]. So in 1999 the FCC and Court of Appeals were told EPA's database was still out of date, with EPA relying on the old thermal effects studies that EPA said needed updating by NCRP, see above and B5 below.

5. Respondents do not dispute the FCC's not asking the federal health agencies evaluate public comments at any time during the rule making.

Respondents stress, "FCC consulted extensively with all of the federal health and safety agencies." (Resp. Br. 23). Yet, they are silent on whether the contents of the docket were the subject of *any* of those consultations prior to the *RF Order*, and admit they were not during the reconsideration period. DF Pet.27-28; CPT Pet. 5-6,12-18; CPT Reply Br. 5-9]. Also, a May 19, 1999 letter of EPA RF scientist N. Hankin states that to his knowledge "the FCC has not asked EPA to review and evaluate *any* of the materials" pertaining to this rule making. (emphasis added) L100, filed at court below; DF Pet. 45,46. Thus, none of the hundreds of studies submitted to the FCC by the public nor comments analyzing them were submitted to FCC's experts for evaluation throughout the 4½ years of the rule making; see 4(b) above.

6. Federal health agencies disagreed with the FCC's conclusion that there is no evidence to *suggest* harm if its rules are followed

FCC concluded, "There is no evidence to *suggest* that transmitters or facilities that comply with our guidelines will cause adverse health effects." (emphasis added*) RF Reconsideration Order*, par.#111; AHA CA Br. 39]. FCC justified its Finding of No Significant Impact (FONSI) based on this conclusion [Opinion A18, in Appendix A submitted by Citizens for Appropriate Placement of Telecom-munications Facilities ("CAPTF)", and hereafter App. A"]. Yet, EPA told FCC "meaningful studies" of non-thermal effects showing "injury to the eye" *exist*, and that "reports *suggesting*

potentially adverse effects (cancer) *may exist*" (emphasis added) JA 443.1, L34. FDA told FCC about the "*existence* of animal studies that *suggest* an association between chronic low level exposures and acceleration of cancer development. Other studies have been published *since* the finalization of the standard that *strengthen* this concern." (emphasis added) JA 450, L40. NIOSH told FCC, "Non-thermal biological health effects have been *reported* in some studies . . . " JA 488,491, L44, L47; AHA CA Br. 34.

C. Reply Argument

#1. On dodging responding to comment in the record:

(a) Respondents incorrectly assert [Resp. Br. 23, n.12] that Petitioner accepts FCC's logic for not submitting public comments to its advising agencies. Not so. See p.3(B4). Also, since there was a paucity of data, the new material presents a 'new picture' Its review is needed so the relevant data is reviewed to assure a rational connection between the facts found and choice made. NEPA also requires responding to public comment Respondents do not address the above. See details at DF Pet. 27-28; CPT Pet. 12-18.

(b) FCC statute provides for reconsideration: See statute 47 USC 405 [DF Pet. 45] and it must be granted when:

(i) "[V]alid grounds for rehearing are manifest error or omission so material that their correction will result in substantial alteration of original decision," *Re Florida Gulfcoast Broadcasters,Inc*, .37 FCC. Rep. 833 (1964).

(ii) "new and relevant evidence" is appropriate to consider "when new evidence *might* have gone far toward undermining basis for Commission's conclusions.." (emphasis added) *Eagle Broadcasting Co. v FCC*, 514 F.2d 852 (1975).

Ignored comments met the above criteria.

(c) NEPA requires documentation to permit record reviw (40 CFR 1502.24) and encouraging public involvement (40 CFR 1506.6(a). FCC's ignoring comments and keeping the draft proposal secret p.2(B1) violates these NEPA rule.

#2: Keeping RF exposure 'as low as reasonably achievable'(ALARA).

Respondents claim FCC properly rejected the ALARA policy because (a) rules to minimize power, e.g. 47 USC 324,

to RF interference; (b) FCC never had adopted ALARA; and (c) FCC has discretion to reject this policy based on the FCC balancing competing interests (Resp.Br. 24).

(a) With regard to 47 USC 324, the statute should be enforced regardless of speculation of the motivation behind it. It requires all of FCC licensees use the minimum power necessary for the communication desired – which is substantively the ALARA policy.

Thus, for example, the FCC must require manufacturers of cellular phones to design their products to use minimum power, thereby reducing risks of both RF interference with electrical devices and possible health risks.

Also, NEPA requires ALARA. NEPA requires of agencies the "Use of all practicable means to * * * avoid or *minimize* any *possible* adverse effects of their actions upon the quality of the human environment." 40 CFR 1500.2(f). .

(b) With regard to Respondents claim that "ALARA was never the standard," [Resp. Br. 24], Petitioner notes that in 1985, the FCC adopted the ANSI 1982 RF standard (lodged with the Court) which does contain the ALARA requirement [Sec. 5, Explanation at p.11, and JA 318]. Also, in 1985 the FCC issued its OST Technical Bulletin No. 65 (lodged with the Court) describing how to comply with the FCC's RF rules and which explicitly noted the ALARA rule (Sec. "The ANSI Protection Guides for Exposure to RF Radiation", p.5,6). [2nd Report and Order, Gen. Docket No. 79-144, 2 F. C.C. Rcd 2064, 2077 n. 5; DF Pet. 28; BJ Br. 12; AHA CA Br. 31-33, AHA CA Reply 14-15].

By failing to explain its rescinding its ALARA policy, the FCC violated the reasoned analysis this court requires [see DF Pet. 29, citing *Motor Vehicles Mfrs. Assn. v. State Farm Mutual*, 463 U.S. 29, 42 (1983)].

(c) With regard to the FCC's 'balancing' of competing interests, Petitioner notes that the FCC's balancing equation was based on FCC's erroneous conclusion that, "There is no evidence to *suggest* that transmitters or facilities that comply with our guidelines will cause adverse health effects." [Reconsideration Order, par.#111, discussed above at B6, p.4-5]. Thus, this 'balancing' fails this Court's requiring "a rational connection between facts found and choice made." *Motor Vehicles Id. 43*, citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

Also, the FCC's 'balancing equation' was a mere reciting of an empty phrase, devoid of any documentation of analyses [see Reconsideration Order, par. #2, JA 2203]. It is similar to the reciting of "substantial uncertainty" in *Motor Vehicles* Id. 52 [DF Pet. 30]. Its documentation void fails NEPA rules for cost/benefit and other analyses [40 CFR 1502.23-24].

#3 Functional compliance issues: Petitioner agrees with CPT Reply at 1-3. Also, see rule that "federal agencies act according to the *letter* and spirit of the Act NEPA]." (emphasis added) [40 CFR 1500.1(a)].

#4: Unconstitutional delegation of authority: Petitioner agrees with CPT Reply 3-5, Worsham Reply 7-10.

#5 Health effects v. environmental effects

Petitioner agrees with Worsham Reply 1-10. Also, Respondent did not address points at DF Pet. 33-35; BJ Br. 26-29. In particular Respondent ignored argument that local jurisdictions were authorized by 47 USC 332(c)(3)(A) to regulate RF exposure to protect health within general zoning authority pertaining to the *operation* of wireless facilities (see BJ Br. 27, 44) and Joint conference report (BJ Br. 28, 55). Health regulations to protect from RF exposure during the *operation* of wireless facilities was not included in the list of preempted functions in 47 USC 332(c)(7)(B)(iv) and Telcom. Act of 1996 sec. 601 protects from implied preemption. *Appeal of Graeme et al.* 975 F.Supp. 570, 574 (D.Vt. 1997) [AHA CA Reply 30].

#6. FCC preemption violates 10th amendment

(a) Court enforcement actions are "commandeering"

Respondents agree it is unconstitutional to commandeer local jurisdictions "by directly compelling them to enact and enforce a federal program." Resp. Br. 13, citing *New York v. United States*, 505 U.S. 144, 161 (1992). But Respondents remain silent when given evidence courts have compelled municipalities to enforce the FCC program by ordering them to issue permits against their will. DF Pet. 37-38; CAPTF Pet. 17-18; CAPTF Reply 4-5. Note that the only lawful 'commandeering' is when States are obliged to follow the Constitution, including the civil rights of persons.

(b) The FCC preemption is 'de facto' commandeering

Respondents' reliance on *Hodel v. Virginia Surface Mining & Reclamation Ass'n* 452 U.S. 264, 290 (1981) [Resp. Br. 13] is misplaced because that case is not similar to the instant case.[see DF Pet. 35-38; BJ Br. 29-36].

Federal commandeering occurs when:

#1: States or local jurisdictions must regulate in the preempted field, *whether explicit in the challenged statute or not, e.g. states requiring counties to regulate,*

#2: Federal statute specifies in some respects what that regulation must include.

The challenged statute in *New York* is an example of 'explicit' commandeering because it explicitly required states to regulate low-level nuclear waste by either the ways of Congress or to take title. *New York* Id. 176. In contrast, *Hodel* is 'simple' preemption *without* commandeering because the challenged surface mining act allowed States to participate if they met federal criteria, or else a comprehensive federally administered program suitable to replace those of the States would apply. *Hodel* 288.

In *Hodel*, whether it would be lawful for States to abandon surface mining regulation requires considering:

(#A) "it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for the general welfare, by any and every act of legislation, which it may deem to be conducive to these ends." [*Nebbia v. People of New York,* 291 U.S. 502, 523 (1934). This duty is noted at DF Pet.36, CAPTF passim.

(#B) "[T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Pruneyard Shopping Center v. Robbins* 447 U.S. 74, 84 (1980), citing *Nebbia.*

(#C) This Court decided state safety regulations may be preempted only upon "the taking effect of a federal measure found suitable to put in its place." *H.P. Welch Co. v. New Hampshire,* 306 U.S. 79, 85 (1939).

Hence in *Hodel*, since there was a suitable federal program, local legislation enacted to abandon the field could meet due process constitutional test of being reasonable.

However, in *Federal Energy Regulatory Comm. (FERC) v. Mississippi*, 456 U.S. 742 (1982), this Court found abandonment of State Utility Commissions a lawful choice, although it "may be a difficult one" because there was no alternative federal program. *FERC* Id. 766. However, that case did not involve public health and safety concerns, and some States had no utility commissions. Thus, abandoning this field was a 'real' choice – since some States had chosen it. The choice of abandonment would not endanger life, safety, or property, so *Welch* would not apply. There was no commandeering since, as in *Hodel*, there was a real choice.

In contrast to *Hodel* and *FERC*, de facto commandeering occurred in *Printz v. United States*, 521 U.S. 898 (1997). Here, the 1993 Brady Handgun Violence Prevention Act (Brady Act) required State chief law enforcement officers (CLEOs) *shall* conduct background checks of gun purchasers. That requirement, the Court held, 'compel[led] the States to enact or administer a federal regulatory program." Printz Id at 933 (quoting *New York* Id at 188).

There *was no explicit command* in the Brady Act requiring States to remain in the preempted field of law enforcement – in contrast to New York where there *was an explicit command* to enter the field of regulating low level nuclear waste. However, as there was no suitable federal law enforcement alternative, this Court presumably decided that neither States nor local jurisdictions could meet their public duty (in Nebbia) and still lawfully abandon this field.

'De facto' commandeering occurs, as in *Printz*, when local legislation enacted to avoid administering a challenged statute would be unlawful, even though the challenged statute does not explicitly require regulation in this field. This happens when there is no suitable federal program, because such legislation would fail a test of reasonably meeting the public duty obligation to protect health and safety. It can also be found unlawful because state law requires regulating in this field. Hence a merely preempting statute is, as applied, commandeering. This is 'de facto' commandeering and meets the conditions of Printz.

The same conditions occur in the instant case. Chaos results if local governments abandon zoning and building code enforcement without a suitable federal program option. See *Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County*, 205 F.3d 688, 703 (4th Cir. 2000). Only if

there is a suitable federal program to address all zoning and permit issues is there 'real choice' to abandon the field.

(c) Many States require local jurisdictions enforce building and fire codes, e.g. the State of Washington (DF App. B1, B2). States with such requirements cannot lawfully void them due to the public duty rule that due process requires. More examples will follow if Writ is granted.

(d) Arguendo, even if the FCC preemption statute is lawful, then it is unlawful as applied because it preempts local health regulations of chronic RF exposure and the federal health agencies have stated the FCC rules do not address this key relevant factor, let alone adequately (B3 at p.2.) To preempt, decisions must be "based on a consideration of the relevant factors" *Motor Vehicles Id.* 43, and general health and environmental knowledge is not enough, rather those setting the preemption rule must be "constantly in session, whose time is exclusively given to the subject." *Mistretta v. United States*, 488 U.S. 361 (1989) (citations omitted) [see CPT Pet. 22].

Respondents question Petitioner's standing to make a 10th amendment challenge, but notes *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999) [Resp. 13, n.7] and notes Respondents' other citations. The 10th amendment "ultimately secures the rights of individuals" (*Gillespie* Id. 703). Petitioner has a personal stake in his commandeering challenge. He noted that as President of Ad-Hoc Association and of other organizations he represents the concerns of his members to local officials unable to meaningfully consider their concerns, yet who are forced to make the permit decisions. See DF Pet. 12-15, BJ Br. 58-59. Finding the preemption commandeers will give relief - placing authority to set RF exposure limits with those who also issue permits

Conclusion: For the reasons stated above the Petition for a Writ of Certiorari of Petitioner should be granted.

Respectful submitted,

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Reply Appendix A

Selected National Environmental Policy Act (Act) Regulations

40 CFR Sec. 1500.1 Purpose

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, goals, (sect 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains 'action-forcing' provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of sec. 101.

40 CFR Sec. 1500.2(f)

[Federal agencies shall to the fullest extent possible:

Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

40 CFR Sec 1502.23 Cost-benefit analysis

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

40 CFR Sec. 1502.24 Methodology and scientific accuracy

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

40 CFR Sec. 1506.6(a)

[Agencies shall] make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

Reply Appendix B
State Regulations pertaining to local jurisdiction enforcement of building codes

Building code requirements of State of Washington
From Revised Code of Washington (RCW)

RCW 19.27.031, paragraphs (1)-(3)
State building code, Adoption,Conflicts, Opinions
Except as otherwise provided in this chapter, there shall be in effect in all counties and cities the state building code which shall consist of the following codes which are hereby adopted by reference:

(1) Uniform Building Code and Uniform Building Code Standards, published by the International Conference of Building Officials;

(2) Uniform Mechanical Code, including Chapter 13, Fuel Gas Piping, Appendix B, published by the International Conference of Building Officials;

(3) The Uniform Fire Code and Uniform Fire Code Standards, published by the International Fire Code Institute: PROVIDED, That, notwithstanding any wording in this code, participants in religious ceremonies shall not be precluded from carrying hand-held candles.

RCW 19.27.060, paragraph (1)
Local building regulations superseded -- Exceptions.

(1) The governing bodies of counties and cities may amend the codes enumerated in RCW 19.27.031 as amended and adopted by the state building code council as they apply within their respective jurisdictions, but the amendments shall not result in a code that is less than the minimum performance standards and objectives contained in the state building code.

(a) No amendment to a code enumerated in RCW 19.27.031 as amended and adopted by the state building code council that affects single family or multifamily residential buildings shall be effective unless the amendment is approved by the building code council under RCW 19.27.074(1)(b).

(b) Any county or city amendment to a code enumerated in RCW 19.27.031 which is approved under RCW 19.27.074 (1)(b) shall continue to be effective after any action is taken under RCW 19.27.074(1)(a) without necessity of reapproval under RCW 19.27.074(1)(b) unless the amendment is declared null and void by the council at the time any action is taken under RCW 19.27.074(1)(a) because such action in any way altered the impact of the amendment.